FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DECISIONS

APRIL 1988

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

APRIL 1988

Review was granted in the following cases during the month of April:

Secretary of Labor, MSHA, v. BethEnergy Mines, Inc., Docket Nos. PENN 87-94, 87-200-R, etc. (Judge Maurer, February 23, 1988).

Danny Johnson v. Lamar Mining, etc., Docket No. KENT 87-68-D. (Reopened for enforcement of Judge Merlin's February 26, 1987 Order Approving Settlement).

Secretary of Labor, MSHA v. Tennessee Chemical, Inc., Docket No. SE 85-63-M. (Judge Judge Fauver, March 15, 1988).

Review was denied in the following case during the month of April:

Secretary of Labor, MSHA v. Emery Mining Corporation, Docket Nos. WEST 87-208, 87-209. (Interlocutory Review of Judge Morris's November 4, 1987 Order Denying Summary Decision).

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 15, 1988

MARTHA PERANDO	:	
	:	
v.	:	Docket No. YORK 85-12-D
	:	
METTIKI COAL CORPORATION	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint brought by Martha Perando pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act" or "Act"). The issue presented is whether Mettiki Coal Corporation ("Mettiki") discriminated against Perando in violation of section 105(c)(1) of the Mine Act when, in response to Perando's development of industrial bronchitis and her request for a transfer from an underground position to a surface position, it reassigned her to a less dusty surface position in the mine's laboratory at a rate of pay less than what she earned in her prior underground position. 1/ Commission Administrative

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1/ Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] or because such miner, representative of miners or applicant

Law Judge Gary Melick concluded that Perando had a "medically substantiated inability to work underground," which in his opinion was "the functional equivalent of a work refusal," that this "refusal" was protected activity, and that the reduction in Perando's pay as a result of her transfer constituted unlawful discrimination under the Act. 8 FMSHRC 1220, 1222 (August 1986)(ALJ). The judge awarded Perando back pay, interest and costs. 8 FMSHRC 1341 (September 1986)(ALJ). We granted Mettiki's petition for discretionary review and permitted the Secretary of Labor to participate on review as amicus curiae. 2/ We hold that under the circumstances of this case no protected work refusal occurred and that Perando's transfer to a lower paying surface position did not violate the Mine Act. Accordingly, we reverse.

From 1980 to 1985 Perando worked as a miner at Mettiki's underground coal mines in western Maryland. In 1983 she began to experience breathing problems. Perando's respiratory problems persisted, and in February 1984, Perando was examined by her personal physician, Dr. Karl Schwalm, who concluded that Perando had a bronchial illness and referred her to Dr. James Raver, a specialist in pulmonary medicine. Dr. Raver examined Perando and diagnosed her illness as industrial bronchitis. Both Dr. Schwalm and Dr. Raver advised Perando that working in an underground mining environment was not conducive to her recovery. Perando was given medication and told that if her condition did not improve she should consider employment in a different working environment. Perando reported her condition to Tom Gearhart, Mettiki's personnel director, who suggested that Perando take six months sick leave in the hope that her health would improve and also suggested that she see Dr. Steven Schonfeld, another pulmonary specialist. Dr. Schonfeld examined Perando on May 2, 1984, and confirmed that she had industrial bronchitis. In his report of that date concerning Perando's condition, Dr. Schonfeld stated that if the symptoms "persist unabated [Perando] may indeed have to change her actual job function." Mettiki Motion to Dismiss, Exh. C. (February 16, 1986). He further recommended that Perando increase therapy, have further tests and return to work. Id. Both Gearhart and Dr. Schwalm received a copy of Dr. Schonfeld's report.

Perando followed Gearhart's suggestion that she take extended sick

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> for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1).

2/ The Secretary's position in this case supports the mine operator. The Secretary submits that the Mine Act does not provide the right to a job transfer with pay protection to a miner suffering from a disease for which the Secretary has not promulgated specific standards pursuant to section 101(a)(7) of the Act. 30 U.S.C. § 811(a)(7).

leave. During this time her underground position was held open. While Perando was on sick leave, Gearhart received a letter dated May 14, 1984, from Perando's personal physician, Dr. Schwalm, expressing his opinion that Perando "cannot continue in her current job" and "recommend[ing]" that she be placed in "a different position without exposure to coal dust." Mettiki Motion to Dismiss, supra, Exh. C. Gearhart also received from Dr. Raver two letters dated June 25, 1984, and August 30, 1984, the former stating that Perando "seem[ed] to be suffering from industrial bronchitis," which was "disabling in terms of her normal ability to work," and asserting that "[a]lthough she may respond to additional forms of therapy, [a] less dusty environment may be the only workable solution." M. Exh. R-3; Tr. 78 (May 1, 1986).

While on sick leave, Perando telephoned Gearhart several times and asked whether Mettiki could place her in a surface mining position. On September 26, 1984, Gearhart asked Perando if she would be willing to work in the mine's surface laboratory. Perando agreed and reported for work at the laboratory the next day. Perando's weekly rate of pay while working underground had been $520.20. In the laboratory position, Perando earned $383.20 per week. (While on sick leave Perando had received $165.00 per week. Tr. 27 (March 6, 1986)). During the period that she was assigned to the laboratory, Perando was absent frequently. On March 27, 1985, six months after she had accepted the position in the laboratory, Mettiki discharged Perando because she had not reported to work for a substantial period of time.

Subsequently, Perando filed a complaint with the Department of Labor's Mine Safety and Health Administration alleging that Mettiki had discriminated against her in violation of the Mine Act. The Secretary of Labor investigated her complaint, found no violation of the Act, and declined to file a discrimination complaint on her behalf. 30 U.S.C. § 815(c)(2). Pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3), Perando then filed a complaint of discrimination on her own behalf with this independent Commission. 3/

In his decision, Judge Melick first found that Perando had contracted industrial bronchitis "from her exposure to coal dust while working at the Mettiki underground mine...." 8 FMSHRC at 1221.

3/ Perando's complaint with the Commission originally alleged five acts of discrimination by Mettiki. Mettiki filed a motion to dismiss all the charges. At a hearing on the motion, Perando withdrew two of her claims, and the judge denied Mettiki's dismissal motion with respect to the other three. 8 FMSHRC 364 (March 1986)(ALJ). The remaining three allegations dealt with Mettiki's reduction of Perando's pay in connection with her transfer to the laboratory; its handling of her work absences while she was assigned to the laboratory; and her discharge. 8 FMSHRC at 1222-24. In his decision on the merits, the judge denied Perando's complaint with regard to Mettiki's treatment of her work absences and her discharge. 8 FMSHRC at 1222-24. Perando did not seek review of those determinations by the judge. Thus, only the judge's determination that Perando was discriminated against when her pay was reduced at the time of her transfer is at issue on review.

Although indicating that "Perando had never 'refused' to work underground in the traditional sense," the judge determined that her "medically substantiated inability to work underground was the functional equivalent of a work refusal." 8 FMSHRC at 1222. He also found that Perando's "work refusal" was based on her reasonable and good faith belief that further work underground would be hazardous to her health, and that this "refusal" was communicated to Mettiki by the doctors' reports to Gearhart. Id. He concluded that Perando's "work refusal" was protected activity. The judge stated that "in recognition of the health hazard presented to Ms. Perando by underground work ..., Mettiki offered her the outside job in the laboratory." Id. He then concluded that because the new position in the laboratory paid less than her prior underground position, "Mettiki did in fact discriminate against her because of her work refusal." Id. We conclude that the judge erred as a matter of law.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof in establishing that (1) he or she engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, supra, 3 FMSHRC at 818 n.20. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Mgt. Corp., 462 U.S. 393, 397-413 (1983)(approving nearly identical test under National Labor Relations Act).

A miner's refusal to perform work is protected under section 105(c) of the Mine Act if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula, 2 FMSHRC at 2789-2796; Robinette, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 471-72 (11th Cir. 1985). "The case law addressing work refusals contemplates some form of conduct or communication manifesting an actual refusal to work." Secretary on behalf of Sedgmer, et al. v. Consolidation Coal Co., 8 FMSHRC 303, 307 (March 1986).

The claim of protected activity asserted on review is that Perando's request to work in a less dusty environment, in conjunction

with her doctors' letters that stated the medical inadvisability of her continued employment underground, constituted a work refusal. We find no evidence that Perando, in fact, engaged in a work refusal. Perando testified that after she was informed by the doctors who examined her that she had developed industrial bronchitis, she wanted to work and did not refuse to work underground. Tr. 44-45 (May 1, 1986). Neither Perando's acceptance of Mettiki's offer of extended sick leave nor her request while on sick leave for a transfer to a surface position constitutes a work refusal. While acknowledging that Perando "never 'refused' to work underground in the traditional sense," the judge nevertheless concluded that Perando's "medically substantiated inability to work underground was the functional equivalent of a work refusal," which was communicated to Mettiki by the doctors' reports to personnel director Gearhart. 8 FMSHRC at 1222. We disagree.

None of the doctors' reports received by Mettiki (summarized above) stated directly or indirectly that Perando was refusing to work underground. The May and June 1984 letters from Drs. Schwalm and Raver expressed only their own medical recommendations that Perando should be working in a different environment without exposure to coal dust. These medical recommendations constitute, at most, communications from others concerning possible personnel actions that the operator might consider with respect to Perando's job assignments. Even viewing Perando's actions and the doctors' reports together, we find no work refusal. Because no work refusal in fact took place and no other claim of protected activity is involved in this proceeding, Perando's discrimination complaint must be dismissed.

Even if we were to assume, for the sake of argument, that a work refusal occurred, Perando's complaint would still fail because, in the circumstances of this case, her "refusal" would not have been protected under the Mine Act. Such an action by Perando would have to be interpreted as a refusal by a miner (not suffering from pneumoconiosis) to report to work unless and until assigned to a dust-free area. Such a right is not granted by the Mine Act.

Section 101(a)(7) of the Act, 30 U.S.C. § 811(a)(7), authorizes the Secretary to develop improved mandatory health or safety standards providing that miners whose health has been impaired by exposure to a designated hazard "shall be removed from such exposure and reassigned" and that such transfer shall be without loss of pay. To date, the Secretary has implemented this statutory mandate by providing under 30 C.F.R. Part 90 that a miner who has been determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis shall be afforded the option to transfer without loss of pay to a mine area where the average concentration of respirable dust is at or below 1.0 mg/m^3. 30 C.F.R. §§ 90.3, 90.100, & 90.103. See generally Jimmy R. Mullins v. Beth-Elkhorn Coal Corp., et al., 9 FMSHRC 891, 896-98 (May 1987).

As the Secretary emphasizes in her amicus brief on review, the Department of Labor has not promulgated any similar transfer-pay retention standards applicable to miners with industrial bronchitis, the illness suffered by Perando. Also even a miner who falls within the protections of Part 90 does not have the right to refuse to work pending transfer to a job in a mine atmosphere totally free of respirable dust. Gary Goff v. Youghiogheny & Ohio Coal Co., 8 FMSHRC 1860, 1865 (December 1986). Exposure to some amount of respirable dust is inherent in virtually all underground coal mining. Thus, even if the Secretary had included miners suffering from industrial bronchitis within the scheme of the present Part 90 transfer-pay retention regulations, Perando would not have had a right under those provisions to transfer with pay retention to a less dusty position since her underground work areas at Mettiki were consistently below the required Part 90 respirable dust level of 1.0 mg/m^3. M. Exh. R-2, Tr. 74-77, 100-102 (May 1, 1986). To accord Perando the right asserted in this case would confer upon her greater transfer-pay retention protection than that enjoyed by Part 90 miners, an anomalous result.

Accordingly, we conclude that Perando failed to establish prohibited discrimination under the Mine Act. We reverse the judge's decision, vacate his award of back pay, interest and costs, and dismiss Perando's discrimination complaint.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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April 20, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 85-148-M WEST 86-83-M
TEXASGULF, INC.	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), the issue is whether substantial evidence supports the finding of Commission Administrative Law Judge Michael Lasher that three violations of 30 C.F.R. § 57.21078, the mandatory "permissibility" standard for underground metal and nonmetal mines, were not of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. 1/ 9 FMSHRC 748 (April 1987) (ALJ). For the reasons that follow, we affirm the judge's finding that the violations were not of a significant and substantial nature.

The Wyoming Soda Ash Operation of Texasgulf, Inc. ("Texasgulf"), is a trona mine located in Sweetwater County, Wyoming. 2/ On April 10,

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1/ 30 C.F.R. § 57.21078 (1986) entitled "Permissible equipment" stated:

> Only permissible equipment maintained in permissible condition shall be used beyond the last open crosscut or in places where dangerous quantities of flammable gases are present or may enter the air current.

Effective October 29, 1987, section 57.21078 was eliminated. 52 Fed. Reg. 24941 (July 1987). New regulations relating to "Approved equipment" have replaced section 57.21078. See 30 C.F.R. §§ 57.22302-57.22305 (1987).

2/ Trona is a hard rock composed of sodium carbonate, sodium bicarbonate, water, and dirt. It is refined in order to obtain sodium bicarbonate, primarily used in making glass.

April 24 and October 15, 1985, Martin Kovick, an inspector of the Department of Labor's Mine Safety and Health Administration, conducted inspections at the mine. During each inspection, Kovick examined a different continuous mining machine located inby the last open crosscut of a working section. On the first inspection, Kovick found a gap in the flange joint of the main control panel on the No. 5 continuous mining machine. On the second inspection, he found a gap in the flange joint of the connection box on the No. 4 continuous mining machine. On the third inspection, he found a gap in the flange joint of the right headlight on the No. 9 continuous mining machine. While the maximum permissible clearance for such flange joints is .004 inch (30 C.F.R. § 18.31(a)(6)), the gaps were .005 inch, .006 inch, and .011 inch respectively. In each instance Kovick issued a citation alleging a violation of 30 C.F.R. § 57.21078.

Kovick measured the atmosphere in the vicinity of the violations for methane. On all three occasions Kovick's hand-held methane detector indicated that no methane was present. Kovick then took bottle samples of the atmosphere. Laboratory analysis of the bottle sample taken during the first inspection indicated that the atmosphere contained .005 percent methane in the vicinity of the main control panel. The latter two bottle samples indicated .009 percent methane in the vicinities of the connection box and the headlight. Kovick did not see any evidence of arcing or sparking inside the cited enclosures or evidence that the continuous miners were electrically malfunctioning.

In the citations Kovick noted his conclusion, with respect to each violation, that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. (See 30 U.S.C. § 814(d)(1).) He testified that methane could get into the main control panel, connection box, and headlight through the impermissible gaps and that arcing or sparking inside the enclosures could ignite the methane and set off larger ignitions or explosions of methane in the atmosphere outside the enclosures.

Texasgulf conceded the violations but disputed the inspector's findings that the violations were of a significant and substantial nature. The administrative law judge concluded that none of the three violations significantly and substantially contributed to a mine safety hazard because there was no reasonable likelihood that all of the various catalysts needed to produce an ignition or explosion would coincide. 9 FMSHRC at 764-765. On review, the Secretary challenges this conclusion. In addition, the Secretary argues that in his decision the judge has erroneously concluded that a violation must constitute an imminent danger in order to be designated significant and substantial. 3/

3/ Section 3(j) of the Mine Act defines "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). In view of our disposition, we need not address this aspect of the Secretary's argument. See n.4, infra.

Section 104(d)(1) of the Mine Act provides that a violation is significant and substantial if it is of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission has explained further that the third element of the Mathies formulation "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) (emphasis deleted). We have emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. Id. In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984). Applying these principles to the instant case, we conclude that the judge's holding that the cited violations were not of a significant and substantial nature is supported by substantial evidence. 4/

We recognize that permissibility violations have the potential for

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4/ The judge also suggests that the Commission's interpretation of significant and substantial is in error because the statutory language of section 104(d)(1), 30 U.S.C. § 814(d)(1), does not require explicitly that there be a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury of a reasonably serious nature. 9 FMSHRC at 759, 760, 765. Contrary to the judge's suggestion, the Commission's interpretation of the meaning of significant and substantial as set forth in National Gypsum, Mathies and the U.S. Steel decisions, including the reasonable likelihood requirement, is fully consistent with the Act as it harmonizes the statutory language of section 104(d)(1) and the overall enforcement scheme of the Mine Act. We therefore decline the judge's invitation to revisit these holdings.

serious danger. Nonetheless, whether a permissibility violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved.

The discrete safety hazard contributed to by the violations at issue is that methane will enter the subject enclosures on the continuous mining machines through the impermissibly wide gaps in the flange joints, be ignited by arcing or sparking of electrical components and trigger a larger methane ignition or explosion. The key question here is whether there was a reasonable likelihood that this hazard would result in an ignition or an explosion. As the judge recognized, in order for ignitions or explosions to occur, there must be a confluence of factors, including a sufficient amount of methane in the atmosphere surrounding the impermissible gaps and ignition sources.

As the judge found, methane is ignitable at a 1.0 to 2.0 percent concentration and is explosive at a 5.0 to 15.0 percent concentration. Tr. 63, 68-69, 168; 9 FMSHRC at 752. At the time the violations at issue were cited, the methane levels were .005, .009 and .009 percent, well below the 1.0 percent concentration necessary for an ignition.

The judge further determined that it was not reasonably likely that ignitable or explosive concentrations of methane would have been encountered had normal mining operations continued. The methane test results taken by Inspector Kovick at the time that he observed the violations showed methane concentrations no greater than .009 percent. Tr. 68, 79, 84. Further, there has never been a methane ignition or an explosion at the mine. Tr. 62, 197, 227. Indeed, the evidence establishes that methane has never been detected in this mine at a level of concentration required for an ignition or explosion. Kovick testified that he had inspected the mine four times a year for eight years prior to the hearing and that he had never detected ignitable or explosive levels of methane in the mine. Tr. 39, 62, 75, 85-86, 90. Texasgulf's ventilation engineer, who worked at the mine for five years prior to the hearing, also testified that he had never detected ignitable or explosive levels of methane in the mine. Tr. 197-98, 242-43, 251. He testified that the highest level of methane he had ever detected was one instance of .2 percent. Tr. 165-66, 197-98, 242, 243.

Further, substantial evidence of record also supports the judge's findings that five trona mines, including Texasgulf's mine, are located within a 20-mile radius, in an area known as the Wyoming Trona Patch. All of the other mines have been subject to section 103(i) of the Act, which requires heightened inspection for mines liberating 200,000 cubic feet of methane or more every 24 hours. 30 U.S.C. § 813(i). 5/ The

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5/ Section 103(i) states:

> (i) Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or

Wyoming Soda Ash Operation liberates considerably less methane than each of the other four mines (Tr. 37, 40-41, 54, 58, 87, 222) and has never been subject to heightened inspection pursuant to section 103(i). Tr. 86, 160. The daily liberation of methane from the mine has been measured at 50,000 to 90,000 cubic feet of methane, which is well below the minimum at which more frequent inspections are required under section 103(i). Tr. 40, 161.

Substantial evidence also establishes that only the Wyoming Soda Ash Operation extracts trona from Trona Bed 20, a bed possessing unique geological features not conducive to methane liberation. Methane liberated during the mining of trona generally comes from oil shale lying in deposits above and below a trona bed. 6/ Unlike the other mines in the Wyoming Trona Patch that have a very high concentration of oil shale in the roof and the floor with resulting higher levels of methane, the roof and floor of the Wyoming Soda Ash Operation are composed of marlstone shale, a combination of clay and shale with some imbedded trona. Tr. 156-58. Marlstone differs from oil shale in that it has a higher percentage of clay. The roof of Texasgulf's mine is composed of green marlstone which contains virtually no methane. The floor is composed of a gray to light brown marlstone, which contains considerably less methane than oil shale. Tr. 159, 240-41, 315. Texasgulf's senior geologist also testified that test drilling of the

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> serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals.

30 U.S.C. § 813(i).

6/ During mining the oil shale may be cut into or otherwise disturbed and methane emissions may result. Trona itself neither emits methane nor burns.

entire No. 20 Bed indicates that the geological structure of the unmined portion of the bed is essentially the same as that which has been mined, showing no oil shale above or below the trona. Tr. 315, 316.

The unrefuted testimony regarding the structure of the No. 20 Bed establishes a substantial factual basis for explaining the mine's prior history of low methane liberation and for reasonably evaluating future liberation. The Secretary argues that sudden liberations of methane cannot be ruled out and that unexpected outbursts of methane have caused ignitions and serious injuries in other trona mines. The Secretary cites the statement of Texasgulf's senior geologist that "there is always a chance of something happening." Tr. 328. However, in determining whether a violation is of a significant and substantial nature the appropriate question is whether there is a reasonable likelihood of such a sudden liberation of methane. In his testimony, Texasgulf's senior geologist further characterized the chance of such a liberation as "highly unlikely." Tr. 328.

Given the detailed testimony establishing the mine's history of low methane emissions and the absence of previous ignitions or explosions, as well as the testimony establishing a reasonable expectation of low methane emissions in the future, we conclude that substantial evidence supports the judge's holding that for each violation at issue there was not a reasonable likelihood that the hazard contributed to would result in a mine ignition or explosion. Compare, U.S. Steel Mining Co., Inc., 6 FMSHRC 1866, 1867-69 (August 1984) (upholding significant and substantial finding where a coal mine liberates over one million cubic feet of methane in 24-hour period, has a history of methane ignitions, and excessive accumulation of coal nearby); United States Steel Mining Co., Inc., 7 FMSHRC 1125, 1128-30 (August 1985) (upholding significant and substantial finding where a coal mine liberates over one million cubic feet of methane in a 24 hour period, has history of past methane ignitions, can liberate dangerous levels of methane in a relatively short period, and where ventilation is below that required); Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 677-678 (upholding significant and substantial finding where a coal mine was subject to inspection pursuant to section 103(i) and sudden outburst of methane had occurred recently).

Because the judge's conclusion that the violations were not of a significant and substantial nature within the meaning of section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), is consistent with applicable precedent and is supported by substantial evidence, the judge's decision is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 21, 1988

DANNY JOHNSON	:	
	:	
v.	:	Docket No. KENT 87-68-D
	:	
LAMAR MINING COMPANY, LARRY E. WILLIAMS, C. GRAHAM MARTIN, and WILLIAMS & MARTIN COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY: THE COMMISSION:

This discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), was dismissed following approval by Commission Chief Administrative Law Judge Paul Merlin of the parties' settlement agreement. 9 FMSHRC 367 (February 1987)(ALJ). Subsequently, counsel for complainant Danny Johnson filed with the Commission a motion to reopen and remand this proceeding, a motion to amend the order approving settlement, and a motion for an award of interest on the balance of the judgment owed. For the following reasons, we reopen this matter for the limited purpose of amending the order approving settlement. We confirm the enforceability of the settlement agreement and the order approving the agreement, but deny the motion for an award of interest.

Based on the pleadings filed herein, it appears that complainant Danny Johnson was employed by Lamar Mining Company ("Lamar") at one of its surface coal mine operations located in Knott County, Kentucky. Johnson was laid off by Lamar on June 27, 1987. Subsequently, he filed a complaint with the Department of Labor's Mine Safety and Health Administration alleging that his layoff violated section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1). The Secretary of Labor did not file a discrimination complaint on Johnson's behalf, however, and Johnson thereupon filed his own discrimination complaint with this independent Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3). In addition to Lamar, Johnson's complaint named as respondents Larry E. Williams and C. Graham Martin, individually, and Williams & Martin Coal Co., Inc., as a successor to Lamar. Johnson's complaint alleged that he had been unlawfully laid off because of his refusal to drive a truck with unsafe brakes.

Shortly after Johnson filed his complaint with the Commission, Johnson, Lamar and Larry E. Williams concluded a settlement agreement

dated February 11, 1987. The agreement provided that in exchange for withdrawal of Johnson's complaint and waiver of reinstatement and attorney's fees, respondents Lamar and Larry E. Williams would pay Johnson damages of $5,000, in four installments of $1,250 each, due between February 18, 1987, and May 18, 1987. The agreement was signed by Johnson and his attorney, by respondent Larry E. Williams, and by Bobby Williams, as attorney for Lamar. Johnson filed the settlement agreement with the Commission along with a motion to withdraw his discrimination complaint and to dismiss the proceeding.

In an Order Approving Settlement and Order of Dismissal issued on February 26, 1987, Judge Merlin approved the settlement as being "in accord with the purposes" of the Mine Act, granted the motion to withdraw and dismissed the case. 9 FMSHRC at 367. No party sought review of the judge's final order, and forty days after its issuance it became a final decision of the Commission by operation of the Mine Act. 30 U.S.C. § 823(d)(1).

In December 1987, counsel for Johnson filed with the Commission a Motion to Reopen and to Remand to Chief Administrative Law Judge, a Motion to Amend the Court's Order Approving Settlement and Order of Dismissal, and a Motion for Interest on Balance of Money Owed pursuant to Settlement Agreement. In these motions, supported by counsel's affidavit, counsel alleges that respondents Lamar and Larry E. Williams have paid to Johnson only the first $1,250 installment of the total of $5,000 in agreed damages. Counsel asserts that he requested the Department of Labor to initiate legal action in enforcement of the judge's settlement approval order, pursuant to the enforcement powers vested in the Secretary by section 106(b) of the Act, 30 U.S.C. § 816(b)(see generally Tolbert v. Chaney Creek Coal Corporation, 9 FMSHRC 1847 (November 1987)). Counsel further alleges that he was informed by a representative of the Department of Labor's Solicitor's Office that the Secretary would not take such enforcement action because the judge's order itself did not expressly direct respondents to comply with the settlement agreement. In relief, Johnson requests the Commission to reopen this closed proceeding and to remand it to the judge so that he may entertain the motions seeking amendment of his prior order by adding specific direction for compliance and the award of interest.

The Commission directed respondents to file a response to Johnson's motions and afforded the Secretary an opportunity to respond as well. The respondents' response does not deny Johnson's assertion that the agreed damages have not been paid in full but states merely that Larry E. Williams and C. Graham Martin should not be joined in this action individually, because Johnson was employed by Lamar, a corporate entity. The response seeks dismissal of Williams and Martin as respondents. (Johnson filed a reply conceding that Martin had not signed the settlement agreement and was not liable to pay thereunder but contending that no proper legal basis existed at this juncture of the proceeding to dismiss the individual respondents as parties.) The Secretary's response does not address Johnson's allegations concerning her objection to the absence in the judge's order of express language directing compliance with the settlement agreement. Rather, the

Secretary states that her decision seeking or declining to pursue enforcement of a final Commission order is a matter committed to her prosecutorial discretion. The Secretary asserts:

> The complainant may enforce the settlement agreement in a state court contract action. Because the state court remedy is available to Mr. Johnson, the Secretary has determined not to file an enforcement action pursuant to section 106(b) of the Mine Act at this time.

S. Response 2 (January 22, 1988).

Essentially, Johnson's motions request the reopening of this proceeding on the grounds that the settlement agreement approved by Judge Merlin has been materially breached or effectively repudiated by respondents. In support of his efforts to enforce the approved settlement agreement, Johnson asks that the judge's order be amended to specifically direct compliance with the agreement. We first examine the jurisdictional issue posed by these motions.

Under our procedural rules incorporating, as appropriate, the Federal Rules of Civil Procedure, the Commission may entertain and act upon motions requesting the reopening of, or other relief from final Commission decisions. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedures apply in absence of applicable Commission rule); Fed. R. Civ. P. 60 (Relief from Judgment or Order). See, e.g., M.M. Sundt Constr. Co., 8 FMSHRC 1269, 1270-71 (September 1986). Fed. R. Civ. P. 60(b)(6) states:

> On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons: ... (6) any other reason justifying relief from the operation of the judgment.

Ample judicial authority supports the general proposition that Rule 60(b)(6) authorizes a federal tribunal to reopen a proceeding that had previously been dismissed by it on the basis of the parties' settlement agreement. See, e.g., Fairfax Countywide Citizens Assn. v. Fairfax County, 571 F.2d 1299, 1302-03 (4th Cir.), cert. denied, 439 U.S. 1047 (1978), and authorities cited; Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1371-72 (6th Cir.), cert. denied, 429 U.S. 862 (1976). See also In re Corrugated Containers Antitrust Litigation, 752 F.2d 137, 141-42 (5th Cir. 1985). Based on the rationale in these decisions, we hold that in appropriate circumstances the Commission may, in its discretion, reopen one of its proceedings pursuant to Fed. R. Civ. P. 60(b)(6) upon a proper showing that an underlying settlement agreement approved by the Commission has been materially breached or repudiated. Upon consideration of the motion and responses before us, it is not disputed that respondents abrograted the settlement agreement shortly after the Commission approved the agreement and dismissed the proceeding. Accordingly, in the circumstances presented by the present record, we grant Johnson's motion to reopen this matter so that we may turn to

consideration of his other motions.

We need not discuss extensively the suggestion that the judge's order is deficient because it does not contain express language directing the parties to comply with the settlement agreement. Upon the unopposed motion of complainant, the settlement was approved by the judge. Plainly, the agreement is not intended to be self-defeating, and the judge's order approving the settlement was not issued as a nullity. The judge's order approving the settlement and dismissing the proceeding obviously and inherently directs compliance with the settlement agreement. We therefore hold that both the agreement and the judge's order approving the settlement are valid, binding and enforceable. To place this result beyond dispute, we hereby amend the judge's order by adding the following sentence at the end of the second paragraph of the judge's order: "The parties to the settlement are directed to comply with the terms of the settlement within the period specified therein."

Because we have granted the relief sought in the motion to amend, it is unnecessary to remand this matter to the judge. Johnson is free to pursue all appropriate remedies that he may have for enforcement of the judge's order.

Concerning Johnson's request for an award of interest on the balance of the judgment, we note that the settlement agreement provided only for a total payment of $5,000 and that no provision was made for interest on this amount during the period of installment payments. A damage award in the form of interest on the unpaid principal is a proper remedy in an enforcement action by Johnson, but consideration by the Commission of an award of interest at this juncture would be inappropriate. Accordingly, we deny Johnson's motion for interest. Similarly, given our disposition, we need not address the Secretary's prosecutorial discretion with respect to Johnson's request that the Secretary enforce the order approving settlement. Finally, no proper basis has been advanced by respondents for the dismissal of any of the individual party-respondents from this proceeding and respondents' motion to that effect is denied.

In summary, we reopen this matter, amend the judge's order and confirm the enforceability of the parties' settlement agreement and the judge's order as a final Commission order. Johnson's motions for remand and interest are denied, and respondents' motion to dismiss the individual respondents is also denied.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

APR 5 1988

KENNETH COURTNEY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 88-12-D
v.	:	MADI CD 87-08
PEABODY COAL COMPANY, Respondent	:	Camp No. 11 Mine

ORDER OF DISMISSAL

Before: Judge Merlin

On January 26, 1988, an Order to Show Cause was issued asking you to provide the necessary documentation in order that we may properly process your complaint. No response to this order has been received and the time to respond has lapsed. Accordingly, it is hereby ORDERED that this matter be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 8 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 87-331
	:	A.C. No. 46-0552-03510
v.	:	
	:	Robinson No. 1 Mine
JAMES ROBINSON, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Koutras

Petitioner's motion filed March 31, 1988, to dismiss its civil penalty proposal filed in this case on the ground that the contested citation has been vacated because the cited standard relied on by the inspector was not controlling IS GRANTED, and this matter IS DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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APR 11 1988

UTAH POWER & LIGHT COMPANY, MINING DIVISION, Contestant	:	CONTEST PROCEEDING Docket No. WEST 87-226-R Citation 3043248; 6/23/87
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Cottonwood Mine Mine ID 42-01944

DECISION

Appearances: Susan E. Chetlin, Esq., Crowell & Moring, Washington, D.C., for Contestant; Robert Cohen, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Lasher

Background

This proceeding arose upon the filing of a notice of contest on July 23, 1987, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d)(1977), herein the Act. There was no related penalty docket extant at the time of the hearing in this matter. 1/

By its initiation of the proceeding the Contestant (herein UPL) sought to obtain review of Section 104(a) Citation No. 3043248 issued June 23, 1987, by MSHA Inspector Robert L. Huggins, charging it with a violation of 30 C.F.R. § 75.200 which provides in pertinent part:

> "Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be sup-

1/ The hearing was held during a 2-day period, August 27, 28, 1987. There are separate transcripts for each day- both beginning with page one. Accordingly, transcript citations will be prefaced with "I" and "II", respectively, in this matter: "I T. __" and "II T. __".

ported or otherwise controlled adequately to protect persons from falls of the roof or ribs."

The Citation, in section 8 thereof, describes the alleged violation as follows:

"The travelway in the 5th east bleeder 2/ is not adequately supported to protect persons from falls of roof and ribs. The cribs being used for roof supports are crushing and starting to roll out at numerous locations in the bleeder. The crosscuts next to the bleeder entry have no additional supports and they are riding over into the bleeder entry pushing out the cribs."

In its Notice of Contest filed herein on July 23, 1987, UPL listed four grounds for its contest:

1. The citation does not identify the location of the offending cribs and therefore is too vague to have adequately informed UP&L as to which of the hundreds of cribs along the 4,500-foot bleeder entry were not providing adequate travelway support.

2. On June 3, 1987, mine management declared approximately 1,800 feet of the 5th East Bleeder too dangerous to travel pursuant to 30 C.F.R. § 75.316-2(f)(3) because of serious roof and ground hazards. 3/ To the extent the Citation covers cribs in that area, it is invalid because the closed portion of the bleeder entry was not an active area, a prerequisite for applicability of § 75.200.

3. The remainder of the travelway in the 5th East Bleeder was adequately supported by the cribs installed along the entry and no violation of 30 C.F.R. § 75.200 occurred.

4. If it is held that certain cribs in the active areas of the 5th East Bleeder entry were not providing adequate support, the hazard of setting posts or attempting other means of abatement was greater than the hazard of leaving

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2/ Herein "5EB".

3/ This seemingly would constitute an admission that an 1800 foot portion of 5EB was unsafe. However, UPL convincingly explained at the hearing that part of the area was only a "buffer" zone for the particular area that was particularly hazardous (II T. 19-22, 61, 101-102) and MSHA's evidence does not otherwise support a finding for the entire 1800 foot area (that between crosscuts 20 and 38).

the area undisturbed, there was no other way to protect the miners and a petition for modification would have been inappropriate in light of the provisions of 30 C.F.R. § 75.316-2(f)(3).

(emphasis added)

30 C.F.R. § 75.316-2 is entitled "Criteria for approval of ventilation system and methane and dust control plan." Subparagraphs (f)(1), (2) and (3), of particular pertinence here, provide:

"(f)(1) Bleeder entries developed after June 28, 1970, should be adequately maintained and free of water to permit safe travel or, if such bleeder entries cannot be traveled without exposing the mine examiner to undue hazard, such bleeder system should be designed and maintained so that bleeder entry performance can be evaluated for adequacy and continuity by a means approved by the Coal Mine Safety District Manager. 4/

(2) When the mine operator deems that safe examination can be made such examination should be made at least once each week by a certified person designated by the operator to do so and the results of such examinations shall be recorded in a book as prescribed in § 75.305. The certified person shall place his initials, the time and the date at as many locations in the bleeder entries as are necessary to indicate that the entire length has been examined.

(3) When bleeder entry travel is considered unsafe the evaluation of bleeder entry performance should be adequate to indicate that the bleeder system is functioning as specified in § 75.316-3(e)(1) and shall be made at least once each week by a certified person or persons and the results shall be recorded in a book as prescribed in § 75.305. To protect the safety of the miners when bleeder entry performance evaluation requires altering the normal airflow through the affected area, such evaluation should be made during idle shifts with power cut off from the affected area. Due precaution should be taken so as not to endanger any other area of the mine and suitable examinations for methane should be made at the edges of the pillar and such other places as may be required." 5/

4/ I find no basis in this regulation to conclude, as UPL has urged (I T. 206-209) that a mine operator may unilaterally close down a bleeder entry and put up a bleeder evaluation point without MSHA approval.

5/ MSHA's interpretation of this regulation is that the entry is required to be traveled on a weekly basis by an examiner until such time as the MSHA District Manager approves some other "means", i.e., the establishment of bleeder evaluation points (I T. 130, 135-137, 155, 157).

Enlightening with respect to the nature and purpose of bleeder entries and systems is Subsection "e" of 30 C.F.R. § 75.-316-2, likewise pertaining to "Ventilation system and methane and dust control plan":

> "(e) Bleeder entries, bleeder systems, or equivalent means should be used in all active pillaring areas to ventilate the mined areas from which the pillars have been wholly or partially extracted, so as to control the methane content in such areas. Bleeder entries or bleeder systems established after June 28, 1970, should conform with the requirements of this § 75.316-2.
> (1) Bleeder entries shall be defined as special aircourses developed and maintained as part of the mine ventilation system and designed to continuously move air-methane mixtures from the gob, away from active workings and deliver such mixtures to the mine return aircourses. Bleeder entries should be connected to those areas from which pillars have been wholly or partially extracted at strategic locations in such a way to control airflow through such gob area, to induce drainage of gob gas from all portions of such gob areas and to minimize the hazard from expansion of gob gases due to atmospheric pressure change.
> (2) Bleeder systems shall include any combination of bleeder entries, bleeder entry connections to any area from which pillars are wholly or partially extracted and all associated ventilation control devices. Such systems should extend from active pillar line of such gob to the intersection of that bleeder split with any other split of air, and shall not include active workings."

Issues

The chief issue is whether the violation charged in the Citation actually occurred (I T. 59-60). At the hearing UPL abandoned one its original contentions that the 5EB was an "inactive" area (I T. 209) and thus not subject to the quoted provisions of 30 C.F.R. § 75.200. Also, although portions of the transcript and briefs are devoted to it, any defense of UPL based on the premise that a mine operator can unilaterally establish bleeder evaluation points without MSHA approval was expressly removed in UPL's supplemental brief (See letter from counsel dated December 2, 1987). This question has other relevance, however.

To establish a violation of the cited regulation (§ 75.200) MSHA must show that roof and/or ribs in 5EB on June 23, 1987, were hazardous, i.e., that they were not "supported or otherwise controlled adequately to protect persons from falls of the roof

or ribs." 6/ Determination of the primary issue raised calls in part for resolution of the conflict in the opinion testimony offered by UPL's and MSHA's witnesses.

A considerable portion of the record was devoted to the question of whether wooden cribs installed by UPL as secondary roof support in 5EB were adequate. 7/

Summary of Record and General Findings

The Cottonwood mine of UPL is a large underground coal mine located approximately 50 miles southwest of Price, Utah. UPL has a payroll of 230 employees at the mine who work in 3 shifts- 2 production and 1 maintenance (I T. 16).

On June 23, 1987, when the Citation was issued, part of the mine was not active and sealed and there were only two active working sections--one section mined coal using a continuous mining machine and the other section mined the 7th East longwall panel using the longwall mining method (I T. 191; Jt. Ex. 2). 5EB was at all material times an active work area where miners normally worked and travelled (I T. 32, 33).

The conditions existent in 5EB when the Citation was issued did not constitute an imminent danger (I T. 61, II T. 18).

6/ In a recent decision, Southern Ohio Coal Company v. Secretary, 10 FMSHRC 138, 141 (February 10, 1988), the Commission pointed out the dual nature of Section 75.200: "Section 75.200 requires both compliance with a roof control plan approved by the Secretary and that the roof be supported or otherwise controlled adequately. An operator's failure to comply with either requirement violates the standard." (emphasis added) The instant matter was tried and argued on the basis of a violation of the Section's proscription against inadequate roof support/control--not on the basis of an infraction of Respondent's roof control plan (I T. 58, 59).

7/ Cribs are a type of roof support used to supplement minimum roof control methods; they are built of 8" x 8" x 36" wood blocks cross-stacked one on top of another similar to Lincoln log construction and they extend from floor to roof. At the Cottonwood mine they are employed in all tailgate entries, longwall panels and bleeder systems around pillared areas and in areas on mine haulageways or mine return airways where long life must be achieved. Their purpose is to maintain roof integrity and keep such areas open for travel and as aircourses (I T. 197-198). Cribs are depicted in the record in Exs. C-3 through C-8, C-11, and Joint Ex. 3.

The Fifth east Bleeder entry (5EB) is a longlife entry (I T. 167). It runs a distance of approximately 4000 feet from Crosscut No. 5 to Crosscut No. 46. (I T. 22, 23, 112, II T. 67). The purpose of 5EB is to "bleed the gob gasses, black damp or whatever" from the working areas of the mine (I T. 22, 23, 77, 193). At the time the Citation was issued, approximately 1200 cribs had been installed in 5EB (II T. 67).

The area cited in the Citation included the most hazardous area between crosscuts 27 and 30, because miners were being exposed to the hazardous conditions and Respondent had not provided all the support that was needed (I T. 29-32, 61, 102, 110, 139-140). Between crosscuts 27 and 30 the roof height is approximately 4 1/2 to 5 feet; in most other areas of 5EB the height is higher (I T. 36).

On June 23, 1987, it was apparent Respondent had attempted to put in additional support in the 27-30 crosscut area by installing donut cribs- some of which met manufacturer's specification and some of which did not (I T. 61, 62).

Bleeder entries such as 5EB are required to be traveled by a certified person on a weekly basis for the purpose of determining if conditions- involving such as methane, black damp, roof, rib, walkways, timbering--- are hazardous (I T. 24, 25). The im-importance of keeping bleeder entries open or travelable is to insure against the buildup of methane, black damp (an oxygen-deficient area) and gob gasses (I T. 26, 132). Bleeder entries also serve as possible escapeways for miners (I T. 106, 133). Inspector Huggins explained this purpose by analogy to the Wilberg mine disaster:

> A. Well, if the -- you know, alternate routes. I can go back to Wilberg. I hate to bring that up; but I think that if, you know, they were maintained and kept open there at times -- which they were opened and miners were all aware of it, they could have come out that way.
>
> Q. So it's possible if the bleeder entry is allowed to remain open or kept open and it could be used as a possible escapeway by miners of the section in an emergency?
>
> A. Yes. (I T. 26, 27)

5EB was a possible escapeway -- not a designated escapeway (I T. 78, 106, 133).[8/]

8/ UPL's Managing Director of Health, Safety and Training, Dave D. Lauriski, testified that 5EB was not a "viable" alternate route of travel from the 7th East longwall face because it was a longer route to the surface, it was remote, it was not designated

In a memorandum dated June 2, 1987 (Ex. R-3) for District 9 SubDistrict Managers and Field Office Supervisors (I T. 166), District Manager John W. Barton addressed the subject of "Roof Support for Longlife Entries":

> "As part of the six month review of roof control plans, all operators are being requested to address long life entries in their roof control plans. It is very important that long life entries be properly supported in order to serve the purpose for which they are designed or intended. Specifically, this means entries such as bleeders, longwall headgates and tailgates, escapeways, main air courses, main haulageways, and travelways be addressed in the plan as long life entries with an explanation of proposed means of primary and necessary supplemental roof support to insure these entries remain open and travelable for their entire life. The intent is to maintain bleeder entries and not allow their condition to deteriorate to a point where safe travel is impossible, thus causing operators to seek approval for the establishment of evaluation points. Escapeways must be maintained and adequately supported and not rerouted as a means to avoid installation of supplemental support. Longwall headgate and tailgate entries as well as main air courses and haulageways must be supported throughout their life to serve the function originally designed or intended.
>
> It is the purpose of this request to impress upon operators the seriousness with which MSHA views protection of long life entries.
>
> It is the responsibility of all inspectors, during normal inspection activities, to determine if roof support in these long life entries is adequate and the requirements of the roof control plan are being met. The District Office must be advised of any instances where compliance with the approved roof control plan fails to maintain adequate long life support." 9/
>
> (emphasis supplied)

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footnote 8 con't
and marked for travel, and accordingly, miners were not trained to use it as a travelway (I T. 196-197, 222). He conceded, however, that such a bleeder has value as an "additional" travelway (I T. 219), even though he felt 5EB was not a "viable" alternative (I T. 222).

9/ Lee H. Smith, MSHA District 9 Roof Control Supervisor, who wrote the memorandum for Barton, explained its purpose:

"It was felt that after Wilberg, that entries that have a longlife, possibly and probably for the life of my-- such as main

In a letter dated June 3, 1987 (Exs. C-1 and R-2), to MSHA District Manager John Barton, UPL's Mine Manager, John Boylen, requested MSHA approval to establish a bleeder evaluation point in 5EB and stated:

> "Roof conditions in the 5th East Bleeder have become hazardous to the extent that we feel it is not safe for the weekly examiner to travel from crosscut 20 to crosscut 38. 10/ We request approval to establish a bleeder evaluation point at 38 crosscut in 5th East Bleeder. Bleeder effectiveness will be evaluated weekly at crosscut 38 and the bleeder will be physically examined from crosscut 38 to crosscut 45 and from crosscut 5 to crosscut 20.
>
> A revised page 26, Rev. 06-03-87, is included reflecting addition of 5th East Bleeder evaluation point. Once approved, this page supersedes the former page 26. Figure IV A should be added to the plan also as page 26.1. Your cooperation in this matter is appreciated." 11/
> (emphasis added)

In response to this letter, MSHA Coal Mine Inspector Robert L. Huggins, visited the mine on June 23, 1987, to evaluate the 5EB. He was accompanied by his supervisor, William E. Ponceroff, Jim Bailey, a company representative, and Don Cologie, a union representative. (I T. 17, 18). Upon completion of his inspection on June 23, 1987, Inspector Huggins issued the subject Citation. The following day, June 24, 1987, Inspector Huggins returned for a closeout conference and advised UPL officials that the area in 5EB between crosscuts 27 and 30 would not have to be resupported since he agreed that evaluation points should be established at each end of this smaller area (I T. 67-69). After abatement time was once extended, the conditions charged in the Citation were considered abated on July 20, 1987, after UPL installed 300-350

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footnote 9 con't
air courses, gate entries, including -- and also bleeders, main haulage ways and other travelways, reassess the roof control in order to extend their life. So that those entries could serve the purpose for which they're designed was intended, or that that could be used as an alternate route of travel." (I T. 167)

10/ The distance between crosscuts 20 and 38 is approximately 1800 feet (I T. 27, 38).

11/ This letter constitutes an admission. See Fn. 3. At the hearing, Mr. Boylen denied being aware of the Barton "Longlife Entry" memo (Ex. R-3), when he forwarded this June 3 letter to Barton (II T. 55-56). Mr. Boylen said he was prompted to write the letter when two subordinates, his longwall Superintendent, and his Safety Director (Randy Tatton) expressed concern about the entry on May 29, 1987 (II T. 56).

wood posts as supplemental support (I T. 64-66, II T. 77). Inspector Huggins was not aware of any UPL opposition to abatement on the basis that the area was too hazardous to attempt abatement (I T. 66). Inspector Huggins described the roof and rib conditions he observed as follows:

"A. In the Fifth East bleeder, we had roof breaking up between the cribs, coming across the entry. We had wire mesh from across the top of the cribs which was starting to sag down with stuff in it. Slabs of ribs had fallen off, pushing the cribs, causing them to belly out. And I think it was the crosscut 15 or 16, I'm not for sure -- but they had a pump switch which was located in the crosscut with no additional supports to this crosscut; cable running up behind the cribs -- energized cable which they had used to energize the pump 25 crosscut of water.

Q. Now, those were the conditions of the roof?

A. Yes. Some of them, yes.

Q. Did you observe the conditions as far as the ribs?

A. Yes. Large slabs of ribs had fallen off. Some of the crosscuts had already fallen in -- the roof of the cribs.

Q. Now, did the entry have any means of roof support?

A. Yes, a double row of cribs. There was some additional support installed, if I remember right, between 27 and 30.

Q. And did you get a chance to observe the condition of the cribs themselves?

A. Yes.

Q. An could you briefly describe the conditions that you found the cribs in?

A. A lot of the cribs were crushed down; a majority of them were, especially on the right side, as we were walking in from -- walking toward the 40's in -- rather in the entry. The right side of the cribs were bellied out, crushed down. What I mean by bellied out, they were bowed in such -- I don't know how you would describe it -- more or less like a pregnant woman. And a lot of the blocks on top, instead of cribbing flush against the top of the block, they had a lot of blocks on top of them, quite a few wedges. On the fiber creek, the donut cribs, the ones that were crushing out had, like, four to six wedges. I didn't count them exactly; just wedged on the top. And then the ones that were staying good, had thicker blocks five to six inches on top of those.

Q. Was there any particular conditions present in the crosscuts of the bleeder entry that you observed?

A. Yes. A lot of the crosscuts had fallen; quite a few were still hanging. You know, bad top in them with pieces hanging around the bolts, each down along both ribs "those ones out there that were starting, too. (I T. 19, 20)

XXX XXX XXX

"Q. Irrespective of the condition of the cribs, could you have issued a violation just on the condition of the roof and ribs itself?

A. Yes.

Q. And explain that, please.

A. The roof itself was cracked out into the walkway over the wire mesh. No support coming between the roof bolts and mass that were in there also. The ribs itself were slammed down into the cribs and parts of it were coming out into the walkway." (I T. 64)."

It is noted here that the problem in crosscut 15-16 near the pump switch was not specified in the Citation (I T. 78).

Inspector Huggins felt the most hazardous area in 5EB was between crosscuts 27 and 30 (I T. 31). When asked to explain why the entire bleeder was cited, he gave this explanation:

"There was deep water back in here between 11 and 12, which we did issue a citation on. Some of the cribs back there were starting to roll. And it was later explained to management that the only ones outlined in those areas, the area we're talking about between 20 and 38, was to correct those ones out there that were starting, too." (I T. 31) 12/

On June 24, 1987, Gary S. Williams, a union safety committeeman who as a timberman had at one time built and installed cribs in 5EB, observed the entire length of the entry. He described the situation as follows:

12/ Despite effort to obtain such at the hearing, Inspector Huggins did not, or was unable to, specify the areas that much in his general descriptions of roof and rib conditions applied to other than testimony relating to the area between crosscuts 27 and 30 (I T. 30-31, 41-42, 50-53, 55-56, 63-64, 69, 79-81). This was generally true of MSHA's witnesses. Further, with respect to the charges in the last two sentences of Section 8 of the Citation, no attempt was made by MSHA to determine the load-carrying capacity of the cribs in 5EB (I T. 86).

"A. Well, on various locations, the roof was cracked and fractured. There was a lot of coal in the cap rock laying in the mesh that was set above the screens. The ribs in a lot of places were butted into the crib line on both sides of the -- on the panel side and on the barrier side.

Q. Did you -- Do you have an opinion as to whether the roof and ribs in the bleeder entry were being adequately supported?

A. No. Other than the cribs being set down the middle of the entry, there was no provision made for any rib control at all.

Q. Do you think the condition that you observed in the entry presented a hazard to anybody traveling into the -- in the area?

A. Yes. There was approximately 300 to 400 feet of extremely bad top, which weekly examiner had to travel under. There was also bad ribs and bad top in and around the pump, in the location of the pump control where the upper fire boss examiner had to turn the pump on." (I T. 101, 102)
(emphasis supplied)

XXX XXX XXX

Q. Okay. Had the cribs, in your opinion, from the time you set the cribs to the time you observed them again on June 24th, deteriorated?

A. Yes. Quite a bit.

Q. And could you explain what you mean by that?

A. Well, there was a lot of cribs that had rolled severely toward the panel side. There was a lot of them that were crushed and broken out. Some just were rolled so bad that there was -- their way -- in my opinion, they were doing anything but just laying there (I T. 103)."

Mr. Williams agreed with Inspector Huggins that the "worst" area was between crosscuts 27 and 30 (I T. 31, 102).

The opinion of MSHA Supervisory Inspector William E. Ponceroff, who accompanied Inspector Huggins on the inspection, generally supported the opinions of Inspector Huggins and Mr. Williams that conditions in 5EB, particularly in the 27-30 crosscut area, were hazardous (I T. 117, 119, 123-128. 150).

His most specific, and thus probative, description of a hazardous condition in 5EB related to the area around crosscuts 27-30:

> Just in general, the cribs were in that specifically 27 to 30 or right around that area that were crushing and similar to one of the photographs here. The ends were splitting. Some of the cribs were not installed so that all of the corners were against the top. There was some cases where they had the crib blocks in but there was wire. (I T. 117-118).

In addition he felt that "some" of the so-called "donut" cribs in 5EB had been improperly installed (I T. 118, 150, 160).

Inspector Ponceroff indicated that prior to issuance of the Citation UPL had been advised as to procedures for requesting permission to install bleeder evaluation points (I T. 131-132, 148). He explained that the Citation was issued on June 23, 1987, even though UPL had requested such permission (letter from Boylen to Barton dated June 3, 1987) because the area had already become hazardous. Thus, Inspector Ponceroff testified:

"A. The difference here is when we arrived, the area was hazardous. They hadn't taken the proper action to install the supports so that the area was no longer safe to travel through. If they had installed the cribs and additional support, and then the condition continue to worsen, that was the time then to get ahold of us and then-- <u>while it was still safe for a man to walk through there</u>. They could have put posts between the cribs to prevent those ribs from coming out and getting -- posts or donuts or clusters. They could have put donuts or more cribs. They had spaces in cases to put cribs in between those that had rolled severely and they had -- they could -- they had room to put donuts there. They had room to do that and still stagger posts. So they could have --"

(emphasis supplied) (I T. 148)

The cited conditions, including those in the 27-30 crosscut area, occurred gradually and would have taken one month to two months to have occurred (I T. 33, 105-106, 119, 139, 148, II T. 18).

Lee Smith, MSHA's roof control specialist, testified that after a crib loses its vertical alignment against a bow-out or deform from the roof, it can reach the point where it is no longer supporting the roof and is a hazard-because after it attempts to roll out, it can be projected away from its original location <u>at a high rate of speed</u>. (I T. 175).

He also gave this explanation of the last sentence of the violation described in the Citation:

"The majority of the crosscuts in the entry were not supported with cribs. They were supported all with the initial roof supporting installation, which was, we were told was five foot between the bottom of the ribs and the top of the roof mats. As that roof deteriorated in the crosscuts, and as it began to

weaken and sag, that roof would fall. So when it would fall, with no additional support in the crosscut, it would continue out toward the entry. Even if it did not enter the entry, it would expose roof strata to the weathering affects -- the weathering affects of the high humidity in the air, which would again weaken the area above the very entry that they're trying to support. On the other hand, we went into -- we went around the roof fall and around crosscut seven in by -- toward the fall, and we saw one crosscut in particular where the mine people had installed cribs and it had done its job. It had prevented the roof fall from extending out of the crosscut into the entry. So that's a clear demonstration that had they put cribs in the entry, it may not prevent all of the roof strata from sagging and separating, but it would have added additional support and probably extended the life of that bleeder entry."

(I T. 179) (emphasis added)

Dave D. Lauriski, Managing Director of Health, Safety and Training for UPL's Mining Division, testified that on the evening of June 23, 1987, after the Citation had been issued, he and Mr. Boylen examined the 5EB. He conceded that they noticed some areas between crosscuts 27 and 30 "where the immediate roof had broken loose from the main roof, and was causing a sag in the chain link fence that had been put up" and he added: "but we also noticed a severe deformation to the crib due to convergence in that area." Mr. Lauriski testified that: "We did not really notice any other severe roof conditions, other than in the area of 27 to 30...." (I T. 200-202). Mr. Lauriski and Mr. Boylen did not travel the entire 5EB that evening (I T. 202). The following admission in Mr. Lauriski's testimony is also directly relevant:

"Q. You mentioned that there were some conditions with immediate roof fall in certain areas in the area from 27 to 30 crosscut.

A. I did not see a roof fall. I saw where the immediate roof had broken loose from the main sandstone roof and was causing the material to be caught up by the chain link fence, but the chain link fence was in affect, bellying down, and in and of itself was causing a hazard or could have caused a hazard to a miner. Beyond that, the area was under extreme convergence and was becoming very narrow, both in height and width."

(I T. 203-204)(emphasis added)

Mr. Lauriski also testified that "Outside of the area 27 to 30 or 31 crosscut, I did not personally see in my opinion, conditions ... from the roof that constituted a danger to the miners because of a poor roof" (I T. 208). Finally, it was conceded that no danger sign had been put up in the area and that "those persons who were authorized" were free to travel in the area (I T. 214).

According to Mr. Lauriski, there was an indication in the weekly examiner's book about a week before June 23, 1987, "that there had been a small fall" in the area of the 27-30 crosscuts, and that "there had been some breaking away, the immediate roof into the chain link, and that there was a need for some action." (I T. 222-223).

UPL first became aware of roof problems in 5EB in October of 1986, at which time at the behest of Mr. Boylen, Morgan Moon (currently Director of Technical Services of UPL's mining division) was directed to monitor the area by walking it on a weekly basis (II T. 12-13). On Moon's recommendation, additional support was installed. Subsequently, according to Boylen, UPL "really became concerned over the area converging together and becoming hazardous to travel for the mine examiner" and the June 3 letter was sent (II T. 13). Mr. Boylen explained why he requested MSHA approval to establish evaluation points even though he didn't think such approval was required (II T. 47-48):

Q. When you say spirit of cooperation, did you -- did you think that you were required to send this letter?

A. No. I didn't then and I don't now. I haven't done it in the past.

Q. Well, let's just step back a minute. Why did you think you were not required to send the letter?

A. As I said, I haven't done it before.

Q. When you say "It", what do you mean?

A. I haven't asked for permission to establish evaluation points.

Q. And what did you do instead in terms of setting up bleeder evaluation points?

A. Weekly examiner; a lot of times it will inform us of the problem. And we would have it checked and just move the danger sign out ourselves. 13/

Q. And did moving the danger sign and establishing the points, require in your view, approval of MSHA?

A. No, ma'am, it does not.

Q. But Mr. Boylen, in this letter, you say that "We request approval." Why did you say that if you didn't believe that you had to?

13/ Prior to June 23, 1987, when the Citation was issued, no such danger sign in 5EB had been put up, however.

A. That would be an oversight on my point. I read the letter and in my opinion, we don't have to ask for permission. But again, with the Wilberg situation and then the way everything went there, we had to ask for a lot of permission over there to do a lot of different things. And I think it was-- the letter was drafted and I overlooked it.

(II T. 15-16)(emphasis added)

Mr. Boylen indicated that the hazard he had in mind in the June 3 letter to Barton was "the convergence of the roof with the floor" 14/ and that there were areas that were but three and half feet high (II T. 17). 15/ Significantly, he felt the "area" was getting worse week after week and that such became evident beginning in January 1987. He also felt that the degree of the hazard was not "imminent" (II T. 18). He was most concerned about the area between crosscuts 27 and 30, and when he inspected it on the evening of June 23, 1987, after the Citation had been issued, he thought "it would be too hazardous to try to put additional support" in this area (II T. 27).

Mr. Boylen said his position was that if an area becomes hazardous he would shut it down (II T. 25, 47), and that he would learn from the fireboss whether the area was not travelable (II T. 25). He also testified, however, when asked how hazardous the area was for a person walking through it, as follows:

> "I did not consider it eminent [sic]. If it would have been eminent [sic], I would have shut it down immediately." 16/ (II T. 18)./

14/ It should be noted, however, that in his June 3 letter, Mr. Boylen actually stated that "Roof conditions in the 5th East Bleeder have become hazardous, etc." In his testimony, Mr. Boylen also indicated that there was "more of convergence problem with the ground" than with the roof (II T. 49).

15/ Although in this early portion of his testimony, Mr. Boylen considered the "hazard" to be the convergence of the floor-roof distance to 3 1/2 feet, he subsequently testified that such a "squeeze" was not an unusual situation for a bleeder entry (II T. 58).

16/ It goes without saying that for roof and rib conditions to infract Section 75.200, such do not have to be so hazardous as to constitute an imminent danger. While Mr. Boylen was probably speaking in the context of the convergence problem at this juncture, nevertheless, it is also a fair reading of the record, and I so find in connection with UPL's raising of the Colorado Westmoreland defense, infra, that the authority he mentioned to shut the area down, would not have been exercised unless a considerable hazard had developed (II T. 15, 18, 19, 23, 25, 27, 28, 34, 47-49, 51-53, 56, 58, 60).

"Danger" signs had not been erected (I T. 207, 214) in any part of 5EB as of the time the Citation was issued, June 23, 1987. The area between crosscuts 27 and 30 was first dangered off thefollowing morning, June 24, 1987 (II T. 27, 28).

5EB was scheduled to be permanently sealed on or about October 15, 1987 (II T. 17, 103) upon completion of the Seventh East Longwall panel.

By letter dated July 15, 1987 (Court Ex. 2), Mr. Boylen requested inter alia that Mr. Barton approve an evaluation point at crosscuts 30 and 31 for evaluation of the 27-30 crosscut area. Such request was approved in a Barton-to-Boylen letter dated July 17, 1987 (Court Ex. 3).

Mine Superintendent Anthony C. Pollastro, testified that at the closeout conference he attempted to find out from MSHA representatives what crib conditions throughout the 5EB would constitute inadequacy:

> And basically asked what criteria they were talking about as far as the failure of the crib or ineffectiveness of a crib. At that time from the questioning in that, I was told that "Any crib that had rolled, needed additional support placed beside it." I asked "What are we talking about, what degree of roll?" And I searched around and finally I said "You mean anything that's out of a vertical plane, as far as a crib, needs additional support?" The answer was Yes. (II T. 74).

Kevin F. Tuttle, UPL's Senior Safety Specialist, in this same connection, testified that at the closeout conference, Inspector Huggins indicated that any time a crib was "bowed" that it was ineffective (II T. 108-110).

Pollastro, based on prior experience, disagreed with MSHA's position as stated at the closeout conference (II T. 75, 80) that cribs out of vertical alignment were defective or inadequate. Mr. Pollastro felt that the cribs in 5EB were "far superior to the timbers" that UPL abated the violation with, and that there was no need for additional support. He thus testified:

> As far as additional support or to warrant the citation that was given, I thought was quite ridiculous in that situation there. We had added additional support in the areas that we thought were needed or that the area that was yielding or converging. And some of the other area that they had cited or they talked about, or to cite the whole entry, was, I felt, quite ridiculous. (II T. 80).

Morgan Moon, Manager of Technical Services for UPL, testified that in January 1986 (it is believed he meant 1987), he observed "deterioration" in 5EB, that in the vicinity of crosscut

30 the "deterioration" began to accelerate as the longwall went by, that there were "some roof falls" and "pressure on the cribs", that the entry was in a "convergence mode" and that supplemental support in the form of additional cribs and donut cribs were installed to help stabilize the area (II T. 218, 221). He conceded that somewhere between crosscuts 25 to 32 there were areas where the immediate roof had separated, and small layers of broken rock had come down between the cribs and the wire mesh (II T. 221). Mr. Moon agreed that "roof fall hazard" has much more serious consequences than convergence (II T. 222). With respect to the nature of cribs, Mr. Moon, a mining engineer (Ex. C-2) gave this significant testimony:

> When the pressure comes on in the case of a crib, you'll see that crib begin to deform. It may roll some. You may get some differential compaction within crib blocks theirself. And it will -- From appearances, it looks like it's all out of vertical and horizontal alignment and it is. This is not uncommon in cribs and that is the main design of cribs. They are placed there because they're a fairly large structure. They have large load carrying capacities. And they resist ground movement within certain limitations. They do not fail rapidly because they are designed to converge and yield and still maintain a large load carrying capacity. (II T. 223)

Mr. Moon indicated that cribs are used in 5EB because of this ability to compress (decrease in height) and still maintain a "very large load carrying capacity." (II T. 224, 225-228).

Mr. Moon was of the opinion that all of the cribs in 5EB except those in the 27-30 crosscut area were functioning properly (II T. 229-231, 237, 272). He had traveled 5EB from October 1986 to June 1987 (II T. 256). In connection with abatement, he indicated that there "really was no need to place any cribs", and with respect to 5EB areas other than the 27-30 crosscut area, he said that since abatement the majority of that area had not taken any weight, the installation of timbers was "purely cosmetic" and that the cribs were functioning properly (II T. 272).

In answer to the question how it can be ascertained when roof is in good condition, Mr. Moon replied:

> You don't see any roof fall material in the walkway. The wire mesh is flush against the roof. The mats are flush against the roof. The bolts are in find shape. I think this is a -- It's normal that people look at a crib, and they assume that the crib problem is caused by roof conditions. This is not the case the majority of the time in our mines. It's due to bottom heave and the pressures applied from the bottom. In fact, the roof is in sound -- sound shape and you don't have a problem with it.

Q. Is that also true of the Fifth East bleeder?

A. That's true with the Fifth East bleeder.
(II T. 246-247).

With respect to the effectiveness of cribs which did not contact the roof with all four top corners, Mr. Moon gave this incisive explanation:

A. The effectiveness of a crib in an eccentrically loaded condition --

Q. What does eccentrically loaded mean?

A. That means the load is not vertically applied or the crib is not in an absolutely vertical condition. Eccentrically loading, or a crib that's tilted, does not appreciably lose any load carrying capacity within the ranges that we see underground. This is just published by the US Bureau of Mines. They've done some testing at their Pittsburg Research Center. And there is a paper out now that will be published very shortly; and they substantiate this with full scale model testing in their mine roof simulators, where they actually displaced the cribs and loaded them and showed there was actually very little load carrying capability lost due to this condition in the cribs or the loading mechanisms. (II T. 251-252)

In reference to the charge in the Citation that the crosscuts next to 5EB "have no additional supports" and are "riding into the bleeder entry pushing out the cribs", Mr. Moon testified that leaving the crosscuts unsupported relieves stress on the entry and that there was no reason for anyone to leave the entry travelway to go into the crosscuts (II T. 245-246, 249).

When asked about his role in the preparation of the Boylen letter of June 3, Mr. Moon gave this testimony:

The Court: Now, when you say you conferred, tell me -- So you did have something to do with the letter being written?

The Witness: Not the actual letter. They said "Why don't you go take a look at it? Tell us what you think." We walked it. I said "Yes. The convergence is continuing. This area is starting to look a little tough. I don't think there's any eminent (sic) danger of collapsing. The condition seems to be migrating both out-by and in-by. And it probably will continue to do so until we get the panel pulled and the area sealed."

The Court: Explain the out-by and in-by.

The Witness: Out-by refers to going towards --

The Court: No, no, no. You know, I mean --where's your reference point there?

The Witness: From the 27 to 30 crosscut.

The Court: Okay.

The Witness: In-by -- in other words, an area that was starting to exhibit what abnormal convergence or it was a migrating thing; and also out-by -- for a ways, there was an area there that was showing signs of convergence and a deterioration of cribs.

The Court: Okay. So you did report that to Mr. Barton. Did you know he was going to write that letter?

The Witness: Yes. I knew that he had planned on establishing a monitor point. (II T. 269-270) (emphasis added)

Dr. J.F.T. Agapito, holding a doctorate in rock mechanics (See Ex. C-9) was called as an expert witness by UPL. He is president of J.F.T. Agapito & Associate, Inc., a consulting firm (Ex. C-10) in the areas of technical engineering and mining engineering among other fields (II T. 276). 17/ He indicated expertise in pillar and crib stability (II T. 277, 279). His examination of the Cottonwood mine and preparation for the hearing occurred in July 1987. (II T. 280-281, 288).

Based at least partly on a study of crib deformation (lateral displacement where the top and bottom of the tested crib become displaced in relation to each other as much as 12 inches) by the U.S. Bureau of Mines (Ex. C-12; II T. 284-287) Dr. Agapito reached the important and convincing conclusion that cribs can undergo very large deformations and still retain their strength. He also concluded that deformed cribs in 5EB- which he referred to as cribs which were "unsymetrically loaded" (meaning that each of the four corners was carrying a different load) -- maintained a "very high strength" (II T. 302-303, 326).

Dr. Agapito's ultimate conclusion was that the cribs in 5EB were effective to maintain stability for the life of 5EB (II T. 302, 311-312, 319, 332, 333, 341-343, 363). He described the basis for this conclusion:

> I based that evaluation on actual measurements of the same type of cribs, and the same size of cribs in the same seam, done at the Plateau Mine. That's very relevant because I repeat myself; the wood is the same type of wood, the

17/ 3 of UPL's expert witnesses were mining engineers, Moon, Pollastro, and Agapito.

seam is the same type -- is the same seam; and the deformations that we measure are on the same order of the roof and floor deformations that we are measuring at UP&L. (II T. 302).

Dr. Agapito's opinion was aided by comparative in-situ measurements taken between cribs at a mine owned by Plateau Mining Company and UPL's Deer Creek Mine which is adjacent to the subject Cottonwood Mine and similar to it in terms of depth, stresses and relationship to the longwall (II T. 294, 295, 314, 328). Measurements of cribs in 5EB were not taken, however, due to insufficient time to do so (II T. 306).

With respect to the third sentence of the charge in the Citation that the crosscuts next to 5EB "have no additional supports" and are "riding over into the bleeder entry pushing out the cribs", Dr. Agapito said he "didn't see anything like that" and that the stresses --from the crosscuts-- were not riding into the entries. This opinion was based on computer analyses (II T. 345-346).

Discussion, Ultimate Findings, and Conclusions

The evidence pertaining to allegedly violative conditions in 5EB divides somewhat into two general segments-- that relating to hazardous conditions in the area of crosscuts 27-30, and that relating to the adequacy of cribs in the remaining areas of the 4000-foot length of 5EB. 18/ The question of pressure and stresses from the unsupported crosscuts "pushing out the cribs" in 5EB (charged in the 3d sentence of the alleged violation) seems to relate more to a cause of alleged 5EB crib inadequacy than to constitute an independent charge of violation.

In Secretary v. Canon Coal Company, 9 FMSHRC 667 (1987) the Federal Mine Safety and Health Review Commission set forth a general explanation of the standard involved here and the approach to be followed:

> Section 75.200 which reflects section 302(a) of the Mine Act, 30 U.S.C. § 862(a), is a mandatory safety standard of central importance in the crucial regulatory area of roof control in underground coal mines. With respect to the requirement in section 75.200 that roof and ribs "be supported or otherwise controlled adequately," this standard is expressed in general terms so that it is adaptable to myriad roof condition and control situations. See generally Kerr-McGee Corp. , 3 FMSHRC 2496, 2497 (November 1981).

18/ In view of the flaws in some of the evidence in terms of specificity, clear articulation, and supportive measuring and testing (particularly on the MSHA side), this decision should be seen as pertinent only to the matter at hand and not particularly authoritative in other matters.

> Questions of liability for alleged violations of this broad aspect of this standard are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the standard seeks to prevent. Cf. Ozark-Mahoning Co., 8 FMSHRC 840, 841-42 (May 1983); U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982). Specifically, the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective -- not subjective -- analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue. See, e.g., Great Western, supra. 5 FMSHRC at 842-43; U.S. Steel, supra. 5 FMSHRC at 5-6."

Proving that reasonably prudent persons can differ, there was strong disagreement between UPL expert witnesses and officials and those of MSHA on the general question of the adequacy of the cribs in 5EB. Any disagreement as to the hazardous nature of the roof and rib conditions in the area of crosscuts 27-30 was not sharply etched, and these two questions are discussed separately.

A. The 27-30 Crosscut Area.

It is useful to keep in mind that the situation for this area (and for that matter, the other areas of 5EB) on June 23, 1987, when the Citation issued was (a) MSHA approval for the establishment of bleeder evaluation points had not been granted (b) the area had not been dangered off by ropes or by installation of "Danger" signs, and (c) miners were being permitted to work in (travel through) the area.

Although MSHA's evidence was general, UPL's Director of Health, Safety and Training candidly and commendably conceded the existence in the 27-30 crosscut area of specific severe roof conditions (set forth in detail above) which he further conceded would constitute a hazard to miners. I also consider, in conjunction therewith, the Boylen letter of June 3 to constitute an admission of hazardous roof conditions in this general area. By all accounts, the 27-30 crosscut area was the most severe in 5EB and UPL officials were aware of the deterioration (a "gradual" process) going on in the entry generally for a period of several months (from at least October 1986) prior to to issuance of the Citation. Significantly, UPL's Manager of Technical Services, who monitored the deterioration in 5EB for a period of several months prior to issuance of the Citation, testified:

Q. Now, after you wrote -- After the letter of June 3rd 1987 was written to the District Manager, was additional supports put in the 27 to 30 crosscut? Did you continue to put in additional supports?

A. Not to my knowledge. It was our opinion that we would discontinue traveling the bleeder and establish a monitoring point.

Q. But I take it a man did travel that area up until -- on a weekly basis up until the time the citation was issued?

A. That's correct, I believe.

Q. But you did -- After the letter, you did stop putting any additional supports in between 27 and 30?

A. To my knowledge, we did, yes.
(II T. 257-258).

Thus, while UPL had hopes of establishing bleeder evaluation points to cover this area, and ultimately intended to close down and permanently seal the 5EB some 4 months from the date the Citation issued, it evidently had not barred miners from this area or dangered it off. It is therefore concluded on the basis of this record that the roof and ribs in 5EB between crosscuts 27 and 30 which were observed by Inspector Huggins on June 23, 1987, had not been adequately supported and this area was hazardous and not adequately controlled when cited (I T. 30, 31, 33-36, 41, 64, 67-68, 102, 110, 117-119, 136, 139, 145, 148, 150, 200, 201, 202-204, 207, 208, 211, 212-213, 214, 222, II T. 28, 48-49, 51, 59-60, 86, 221, 257, 366-367, Exs. C-1, R-6). Two persons were exposed to the hazards in this area of 5EB, the person who conducted the weekly examination and the "pumper" who was described by the inspector as the person who "goes in and pumps water out" (I T. 32, 88) approximately one to three times a week.

Accordingly, a violation of 30 C.F.R. § 75.200 is found to have occurred as charged in the first sentence of Section 8 of the Citation.

I am unable, however, to conclude that the entire area between crosscuts 20-38 (specifically mentioned in the Boylen letter of June 3) was hazardous either from defective cribs or from other unsafe roof/rib conditions because of (1) the lack of probative evidence and (2) my resolution of conflicts in the opinion evidence discussed in various parts of this decision (By way of further illustration, see dialogues at I T. 31-32 and 53-56).

Finally, it is mentioned that UPL, in addition to some contentions it has now abandoned (noted above), has raised other arguments. One is that:

> ... natural convergence caused by vertical pressures is not covered by Section 75.200, ie.e., convergence in the 5th East bleeder was not a roof control problem and did not create the kind of roof and rib fall hazards addressed by the regulation." (Contestant's brief, pg. 19).

While there was a problem with convergence in 5EB, there was also a problem with inadequate support in the area of crosscuts 27-30 as charged by MSHA. The fact that there was a problem with the floor rising to meet the roof, does not alter the fact that there existed the violation charged by MSHA. While the effect, i.e., convergence itself, can be the hazard, convergence can also be a cause-or contributing cause-of violative roof and the rib conditions. I find no merit in this contention of UPL's and it is rejected.

B. Remainder of 5EB---Crib Adequacy

The essence of the second and third sentences of Section 8 of the Citation involves the adequacy of cribs. As pointed out in MSHA's brief, the "major dispute at the hearing concerned the adequacy of the wooden cirbs which were being used as secondary support in the 5th East bleeder entry."

Proving such allegation of "inadequate" support (or inadequate controls) requires evidence as to what type of support or controls a reasonably prudent person would install under the circumstances. Quinland Coals, Inc., 9 FMSHRC 1614 (1987); U.S. Steel, supra. This "reasonably prudent person" test mandates an objective, not subjective, analysis of all the surrounding circumstances and factors. I take it that one facet of this analytical approach is that even though it may have been reasonable for the issuing Inspector to believe a violative hazard existed from eyeballing a troublesome situation in the mine, that if further testing, analysis, informational input and informed judgment establishes that such was not a hazard the initial determination must be set aside. The adequacy of particular roof support must be measured against what the reasonably prudent person would have provided in order to afford the protection intended by the standard. Southern Ohio Coal Company v. Secretary, supra.

Here, as fairly pointed out in UPL's brief, every mining engineer (all of whom were UPL witnesses) who testified at the hearing was of the opinion that the cribs throughout 5EB were effective to support the entry. In addition, Mr. Lauriski, while candidly conceding the hazardous roof conditions in the 27-30 crosscut area, was of the opinion that there were no dangerous conditions outside that area. There was evidence presented indicating that the issuing inspector felt that cribs were inadequate because they were out of vertical alignment (deformed). UPL firmly and convincingly rebutted this proposition through witnesses who evinced a greater familiarity with 5EB conditions

and crib behavior than MSHA's as well as the well-documented testimony of its expert, Dr. Agapito. His conclusions were based on empirical testing of cribs identical to those at the subject mine under mining conditions more adverse than at the subject mine, and also on tests conducted by the Bureau of Mines. I find such opinions of a higher quality and entitled to greater weight than opposing views based solely on visual examination and diminished in other ways noted herein. UPL's evidence that the cribs in 5EB were not inadequate due to deformation (and compression), being the more persuasive, is accepted.

MSHA's opinion evidence as to crib adequacy generally (and as to any single crib) was not supported by measurements or any type of testing. Although such evidence from MSHA inspectors is generally and in the abstract entitled to considerable weight, when challenged by better supported, higher quality opinion evidence, it is subject to rejection. MSHA's evidence was exceedingly vague and general. No specific crib (or cribs) was pin-pointed or described in such a way that opinion evidence could be directed to it or them. Nor did MSHA show the number of cribs out of the approximately 1200 cribs in the entry, that could actually be said to be defective, ineffective, or hazardous. Where descriptions of conditions were relatively vivid, the locations of such were usually not ascertainable, and vice versa. Scrutiny of the record thus does not produce substantial, reliable or probative evidence that locations other than the 27-30 crosscut area were in violation. The brief and general summary of its witnesses' testimony in MSHA's brief (pgs. 5 and 8) is a fairly accurate representation, and perhaps fallout from, the testimonial imprecision of their accounts. Thus, the references are to "many of the cribs", "in various locations" "others", "cribs" "in the crosscut areas" and "areas".

Since the evidence of UPL's witnesses successfully rebutted that of MSHA's, to the extent that generalities can be dealt with, it is concluded that it was not established by the preponderance of the reliable, probative evidence that other than in the 27-30 corsscut area, the cribs in 5EB, or any single crib, deformed or otherwise, at the time the Citation was issued, did not maintain sufficient load-carrying capacities sufficient to adequately support the entry.

Remaining Issues

Three remaining matters (raised by UPL in this matter and litigated) remain to be discussed, UPL's contention that it has the right to unilaterally establish bleeder evaluation points without MSHA approval, the "greater hazard" defense, and vagueness of the charges.

(1) Evaluation Points.

Although in its supplemental brief, UPL sought to remove the "unilateral right to establish evaluation points" issue, it nevertheless made the argument in its initial brief that its intent to and attempt to establish evaluation points was part of its effort to take remedial measures to correct the violative conditions and thus any violation should be excused under the rationale of Colorado Westmoreland, Inc., 4 FMSHRC 194 (1982) (UPL Brief, pgs. 25, 26). This contention was not removed in its supplemental brief. The question was extensively litigated and I have previously concluded that the regulation seems clearly to contemplate MSHA approval for the establishment of evaluation points (See Fn. 4). Upon consideration of this question, I conclude that Colorado Westmoreland, supra, is inapplicable to the facts of this case, since, contrary to the situation there, UPL was dilatory in seeking to establish evaluation points. 19/ The position of MSHA which is well stated in MSHA's brief, is here adopted:

> Besides contesting the actual conditions stated in the citation, UP&L views this case as a vehicle to limit the role of MSHA's District Managers in approving mine ventilation and roof plans. UP&L contends that 30 C.F.R. 75.316-2(f)(3) permits an operator at his option to elect to have a bleeder evaluation point established in lieu of maintaining a bleeder entry in travelable condition. Thus, UP&L would merely notify MSHA that it is establishing an evaluation point. By taking the language of 30 C.F.R. 75.316-2(f)(3) totally out of its intended context as part of the approval criteria, UP&L seeks to distort the regulatory scheme. As indicated in the first sentence of section 75.316-2, "this section set out the criteria which District Managers will be guided in approving a ventilation system and dust control plan on a mine by mine basis. As criteria to be used as guidelines by the District Manager in the plan approval process, the regulation cannot supercede the mandatory language of 30 C.F.R. 75.200 which requires mine operators to support all active areas where men

19/ The record makes some case for the proposition that UPL may have been failing to install additional adequate support, or delaying such, because the entry would ultimately be closed by convergence or permanent sealing (I T. 105-106, 136-137, 179; II T. 27, 45-47, 49, 53, 58, 59-60, 78, 98-99, 101, 104-105, 257, 270, 366). See fn. 16. It was conceded that Inspector Ponceroff had advised UPL's personnel "to anticipate" the problems when he instructed them on the procedures for requesting approval to establish evaluation points (II T. 98, 101).

are required to work or travel. Only after the District Manager exercises his approval function and approves a specific bleeder evaluation point as an addition or amendment to an existing ventilation plan is the mine operator permited [sic] to examine for hazardous conditions from that point. Taken to its logical conclusion, UP&L's reading of the regulation could remove every bleeder entry in their mines for being traveled by mine examiners. It would condone and encourage an operator's neglectful maintenance of bleeder entries. This result was not the intent of 30 C.F.R. 75.316-2(f). The criteria assumes that an operator has undertaken full and constant efforts to maintain roof and rib conditions in its bleeder entry. Only after those vigorous efforts have failed and rehabilitation is likely to be unsuccessful should an operator seek permission to establish a bleeder evaluation system. In such a situation, District Managers have authority to approve the request. Here, the District Manager properly denied the request for all but the area between crosscuts 27-30.

Furthermore, it appears that UP&L's June 3, 1987 letter addressed to MSHA's District Manager, requesting approval to establish a bleeder evaluation point at Crosscut 38 undermines their legal position on this issue. The letter is the best evidence of UP&L's clear intention to seek MSHA's approval to revise its present plan, and not to merely inform MSHA that it had taken unilateral action. UP&L continued to require the weekly mine examiner to travel entirely the bleeder entry to examine for hazardous conditions."

UPL's assertion of the Colorado Westmoreland defense is found to lack merit and is denied.

(2) "Greater Hazard" Defense.

As noted hereinabove, UPL, in its Notice of Contest (and by letter of August 14, 1987) alleged that should it be found that certain cribs in 5EB were not providing adequate support, the hazard of achieving abatement-- by setting additional posts or other means-- would be greater than leaving the area undisturbed.

I conclude that UPL has abandoned this defense since it was not raised or argued in its post-hearing brief, and also since it was not mentioned as an issue at the hearing (I T. 59-60). It is further noted (1) that UPL's representatives did not raise the question when it discussed with MSHA officials how to proceed to abate the Citation (I T. 66), (2) that during the closeout conference it was made clear that the area between 27-30 crosscuts would not be required to be supported since conditions had become too hazardous there (I T. 67), and (3) that UPL apparently had no trouble in its abatement efforts (II T. 75-79).

In any event I am unable to find in this record, evidence which meets the three-prong test for establishing this defense, to wit: (1) the hazards of compliance are greater than non-compliance; (2) alternative means of protecting miners are unavailable; and (3) a modification proceeding under section 101(c) of the Mine Act would not have been appropriate. Penn Allegh Coal Co. Inc., 3 FMSHRC 1392 (June 1981). See also Sewell Coal Co., 5 FMSHRC 2026 (December 1983).

For these various reasons, any such defense is found to lack merit and is rejected.

(3) Vagueness.

In its Notice of Contest, UPL initially, and I think justifiably, raised the contention that the Citation was too vague to sufficiently inform UPL of the charges. The problem with general allegations and testimony carried through MSHA's entire case and has been noted and discussed throughout this decision. In the final analysis, it has had much to do with the conclusion that the charges in the last two sentences of Section 8 of the Citation were not established.

ORDER

Section 8 of Citation No. 3043248, consisting of three sentences wherein the description of the alleged violation is set forth, is modified:

(1) so that the first sentence thereof reads as follows: "The travelway in the 5th East bleeder between crosscuts 27 and 30 is not adequately supported to protect persons from falls of roof and ribs"; and

(2) to strike the second and third sentences thereof.

As modified, Citation No. 3043248 is affirmed.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 11 1988

RUSHTON MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 86-44-R
v.	:	Order No. 2404261; 11/5/85
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Rushton Mine Mine I.D. 36-00856
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 86-92
	:	A.C. No. 36-00856-03554
v.	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	

DECISION ON REMAND

Before: Judge Broderick

On this case, the Commission reviewed my decision insofar as it related to order 2404227 issued under section 104(d)(2) of the Act and alleging a violation of 30 C.F.R. § 75.1434(a)(2). On March 22, 1988, the Commission affirmed my conclusion that a violation occurred, and reversed my conclusion that it resulted from Rushton Mining Company's (Rushton's) unwarrantable failure to comply with the mandatory standard. Rushton Mining Company, 10 FMSHRC ____ (1988). The proceeding was remanded to me for reconsideration of the civil penalty.

Rushton is a large operator. It had a moderate history of prior violations. The violation here was promptly abated in good faith. The violation was moderately serious and resulted from Rushton's ordinary negligence. Considering these conclusions under section 110(i) of the Act, I believe that $375 is an appropriate penalty for the violation found.

ORDER

Rushton is ORDERED TO PAY within 30 days of the date of this decision the sum of $375 for the violation of 30 C.F.R. § 75.1434(a)(2) charged in order 2404227 (modified by the Commission to a 104(a) citation).

James A. Broderick
Administrative Law Judge

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APR 13 1988

U. S. STEEL MINING CO., INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 86-305-R
v.	:	Order No. 2685834; 8/28/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Maple Creek Mine Mine I.D. 36-00970
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 87-241
	:	Maple Creek Mine
v.	:	
	:	
U. S. STEEL MINING CO., INC., Respondent	:	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor; Billy M. Tennant, Esq., Pittsburgh, Pennsylvania, for U.S. Steel Mining Co., Inc.

Before: Judge Broderick

STATEMENT OF THE CASE

U.S. Steel filed a notice of contest, challenging an order of withdrawal issued on August 28, 1986, charging an unwarrantable failure violation of 30 C.F.R. § 75.400. The order alleged that there were accumulations of loose, fine coal in certain locations in the subject mine.. In the penalty proceeding, the Secretary seeks a civil penalty for the alleged violation. Because the two proceedings involved the same alleged violation, they were consolidated for the purposes of hearing and decision. Pursuant to notice the consolidated cases were called for hearing in Pittsburgh, Pennsylvania, on January 14, 1988. Inspector Francis Wehr testified for the Secretary; Paul Gaydos, Barry Kovell, and Robert Bryan testified on behalf of U.S. Steel.

Both parties have filed posthearing briefs. I have considered all the evidence and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

U.S. Steel was the owner and operator of the Maple Creek Mine, an underground coal mine located in Washington County, Pennsylvania. The mine is classified as a gassy mine, and liberates over one million cubic feet of methane in a 24 hour period. For this reason, it is subject to a 103(i) spot inspection every five days. U.S. Steel produces over 9 million tons of coal annually, and the subject mine produces almost 2 million tons annually. The subject mine was assessed for 571 violations in the 24 months immediately preceding the issuance of the order involved in this proceeding, of which 69 were violations of 30 C.F.R. § 75.400.

On February 4, 1986, a 104(d) order (2683120) was issued to U.S. Steel charging a violation of 30 C.F.R. § 75.400. The assessment for this violation was paid. On April 15, 1986, a 104(d)(2) order of withdrawal (2680602) was issued charging the same violation. There is no evidence in the record of any further 104(d) orders issued thereafter prior to the order contested in this proceeding. Between July 22, 1986 and August 26, 1986, Federal Mine Inspector Francis Wehr issued seven 104(a) citations alleging violations of 30 C.F.R. § 75.400 in various locations at the subject mine. Inspector Wehr stated that during this period he discussed the mine's failure to clean up the loose coal with management representatives.

On August 28, 1986, Inspector Wehr was engaged in a regular safety and health inspection of the subject mine. He found accumulations of loose coal in nineteen different locations along the 7-Flat, 13-Room belt conveyor. The accumulations varied in depth from 1 to 16 inches, in width 16 to 17 feet, and in length from 10 to 12 feet. The accumulations were for the most part wet, and some of them were actually under water. But in two locations (splits 8 and 10), the loose fine coal accumulations were dry. The bottom undulated, so that portions of the other accumulations extended above the water and were dry or drying. Because of this condition, Inspector Wehr issued the 104(d)(2) order involved in this proceeding. Witnesses for U.S. Steel disputed the testimony of Inspector Wehr that some of the accumulations were dry. I accept the testimony of Inspector Wehr which was supported by his contemporaneous notes (Govt's Ex. 2). The accumulations were of such an extent that they must have taken 3 to 4 months to occur. The areas involved had been rockdusted. The Inspector did not take a methane reading. At the time the order was issued, the belt conveyor was energized

and a power cable 5 to 6 feet above the accumulations of coal was hung on J hooks. Prior to the issuance of the order, the operator was in the process of cleaning up coal spilled at the "front end of the belt conveyor entry."

Inspector Wehr testified that the mine was on a "104(d)(2) chain." He stated that he checked the mine file prior to beginning the inspection to determine this. The mine is inspected quarterly, the first quarter being October, November and December. Inspector Wehr testified that he began his quarterly inspection during which the order here was issued on June 1, 1986. It appears, however, that in fact it began on July 1, 1986. He also testified that it took approximately 3 months to completely inspect the mine.

The condition was abated by miners shovelling the coal on to the belt and loading it out. The abatement took approximately four to six days. Because the accumulations were for the most part very wet, it was necessary to build dams on the belt with bags of rock dust to keep the coal from falling off. There is no evidence of any defects in the belt rollers or cable at the time the order was issued.

REGULATION

30 C.F.R. § 75.400 provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electrical equipment therein.

ISSUES

1. Did the violation charged in the contested order occur? Specifically, did the cited accumulations consist of combustible material?

2. Did the Secretary show that there was no "clean inspection" of the mine between the time of the last 104(d) order and the order contested herein?

3. If a violation is established, was it the result of the operator's unwarrantable failure to comply with the standard?

4. If a violation is established, was it significant and substantial?

5. If a violation is established, what is the appropriate penalty?

CONCLUSIONS OF LAW

VIOLATION

The existence of the accumulations in the areas cited in the contested order is not seriously disputed. U.S. Steel contends, however, that they were not combustible because of the water in the area. But I have found as a fact that in at least two areas, the accumulations were dry. Further, even wet accumulations of loose coal are combustible. The Commission directly addressed this issue in Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1121 (1985):

> Even if, as Black Diamond asserts, the accumulation was damp or wet, it was still combustible. For example, in the case of a fire starting elsewhere in a mine, the heat may be so intense that wet coal can dry out, ignite and propagate the fire.

I conclude that the accumulations here were combustible, and that a violation of 30 C.F.R. § 75.400 is established.

INTERVENING CLEAN INSPECTION

Section 104(d)(2) of the Act requires that after a withdrawal order has been issued under section 104(d)(1), another withdrawal order be issued for "similar violations" found on a subsequent inspection, "until such time as an inspection of such mine discloses no similar violations." The burden of proof is placed on the Secretary to establish that all areas of the mine were not inspected for all hazards during the time period in question, in this case, between April 15, 1986 and August 28, 1986. Kitt Energy Corp., 6 FMSHRC 1596 (1984), aff'd sub nom. UMWA v. FMSHRC, 768 F.2d 1477 (D.C. Cir. 1985); U.S. Steel Corp., 6 FMSHRC 1908 (1984). The Secretary introduced evidence that MSHA's records indicated that the subject mine was on a "104(d)(2) chain," but failed to show that a "clean inspection" had not occurred during the four month period from April 15 to August 28, 1986. The Commission and the Court of Appeals ruled that an intervening clean inspection is not limited to a regular quarterly inspection so long as the entire mine is inspected for all hazards. Inspector Wehr testified that it takes approximately three months to inspect the entire mine. I conclude therefore that the Secretary failed to establish in this case that a clean inspection did not occur between April 15 and August 28, 1986. Therefore 104(d)(2) order was improperly issued.

The underlying violation, however, survives the vacation of a 104(d) withdrawal order. Kitt Energy, supra.

UNWARRANTABLE FAILURE

In Emery Mining Corp., 9 FMSHRC 1977 (1987), the Commission stated that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." The inspector in this proceeding cited the violation as unwarrantable because the same violation had been cited a number of times in other areas of the mine, and the operator had been instructed to clean up accumulations. These other areas (5-Flat and 9-Flat), however, were both dry sections. The area cited here (7-Flat) was extremely wet, and water continued to come in from the bottom, ribs and roof. The operator believed (erroneously) that because the accumulations were wet, and cleaning them up was extremely difficult, it was not required to clean them up. The condition resulted therefore not from negligence but from the operator's willful conduct. This is not to say that it willfully violated the standard, but that it willfully failed to clean up the accumulations which it was aware of but "didn't consider . . . enough of a hazard to clean up." (Tr. 98.) I conclude that the violation resulted from the unwarrantable failure to comply with the standard.

SIGNIFICANT AND SUBSTANTIAL

A violation is properly cited as significant and substantial if it contributes to a safety hazard reasonably likely to result in serious injury. Mathies Coal Co., 6 FMSHRC 1 (1984). The accumulations here were substantial, but were largely extremely wet. Although they were combustible, they were not reasonably likely to contribute to the hazard of a mine fire. Although the mine is gassy, there is no evidence of methane present, and no evidence of any defect in the cable or other electrical equipment. I conclude that the violation was not shown to be significant and substantial under the Mathies test.

PENALTY

Although the violation was not shown to be significant and substantial, it was moderately serious because of the extent of the accumulations, the gassy condition of the mine, and the presence of energy sources. It was caused by the operator's willful conduct. The operator is a large operator, with a significant history of prior violations. The violation was abated in good faith. Based on all of the above findings, and considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $600.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

(1) Order of Withdrawal 2685834 issued August 28, 1986, is MODIFIED to a 104(a) citation;

(2) Within 30 days of the date of this decision, U.S. Steel Mining Company shall pay the sum of $600 as a civil penalty for the violation of 30 C.F.R. § 75.400 found in this decision.

James A. Broderick
Administrative Law Judge

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APR 14 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 87-199 A.C. No. 46-06225-03533
v.	:	Docket No. WEVA 87-200 A.C. No. 46-06225-03534
M & J COAL COMPANY, INC., Respondent	:	Mine No. 1

DECISION

Appearances: William T. Salzer, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for Petitioner;
W. Henry Lawrence IV, Esq., and Louis E. Enderle, Esq., Steptoe & Johnson, Clarksburg, WV, for Respondent.

Before: Judge Fauver

These are consolidated civil penalty proceedings in which the Secretary of Labor alleges violations of safety standards under the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

Citation 2699438 - WEVA 87-199

1. On November 16, 1986, at 3:20 p.m., MSHA began an investigation at Respondent's No. 1 Mine, in response to a report of a mine fire. MSHA Supervisor Raymond Ash was informed of the mine fire by John Markovich, superintendent of M & J Coal Company, by phone at 2:22 p.m., on November 16. Mr. Markovich informed Mr. Ash that the fire was located approximately 300 feet inby the opening to the mine. Mr. Ash issued a § 103(k) order, closing the mine subject to an investigation of the fire by representatives of the Secretary.

2. An MSHA representative arrived at the mine site around 3:00 p.m. with methane and carbon monoxide detectors, and safety

gear. At that time, Mr. Markovich revised his statement regarding the location of the fire, placing it 1000 feet inby the pit mouth.

3. MSHA assisted Respondent on November 16 and thereafter by using carbon monoxide and methane detectors to test for the presence of explosive gases, providing technical assistance regarding the methods of building fire seals, providing self-contained oxygen equipment to individuals fighting the fire to protect them against smoke inhalation, providing expertise in testing the mine roof, which can weaken during a fire, providing a back-up team in the event of injury to tne individuals fighting the fire, and by providing expertise in recommending the installation of additional phones for better communication.

4. Beginning November 11, and each day from November 11 through November 15, Mr. Markovich or C.J. Tharp, mine foreman, or both, observed smoke along the roof above the No. 1 tailpiece and No. 2 head drive. The smoke had a "sooty smell." The smoke originated from within the underground mine and was not drawn in from outside the mine. Respondent did not notify MSHA of a mine fire until November 16.

5. On November 11, Respondent's Mine No. 1 was not in production. The only persons who entered the mine on November 11 were Superintendent John Markovich and General Foreman C. J. Tharp. Mr. Markovich and Mr. Tharp entered the mine to check the operation of certain "stand pumps."

6. On November 11, Mr. Markovich and Mr. Tharp observed pockets of white or gray smoke along the mine roof near the No. 1 belt tail piece and No. 2 belt head. Mr. Markovich testified that he initially thought the smoke might be coming from a trash fire outside the mine near the mine intake fan. He investigated outside the mine but found no indication of a fire near the entrances to the mine.

7. Mr. Markovitch testified that, when he saw no evidence of a fire near the mine entrances, he began to suspect that a gob pile 100 to 200 feet from the pit mouth of the mine might be smoldering. On November 13 or 14, he ordered a D-6 caterpillar bulldozer brought in to doze the pile to see whether or not the gob pile was burning and producing smoke that might be pulled into the mine by the ventilation fan. He testified that they discovered that the gob pile was burning and producing smoke, and he ordered that the gob pile be dozed until the burning material was uncovered and extinguished. That operation took place on November 14, 1986.

8. The smoke in the mine did not dissipate after the dozing of the gob pile near the pit mouth and ventilation fan. Mr. Markovitch testified that he then began to suspect that the mine smoke (that was found each day) might be caused by a fire in

a gob pile that was owned by another company and lay on the surface over the area mined by M & J Coal Company. He testified that he thought that if there were a fire in that gob pile it might be forcing smoke into the mine through cracks in the coal seam, and that on November 15, in an attempt to test this theory, he caused three bore holes to be drilled through the gob pile and into the mine in order to sample the gob pile strata. The samples of the material brought up by the drill showed no evidence of burning or hot material in the gob pile.

9. On November 15, Mr. Markovich and Mr. Tharp continued to see white or gray smoke along the mine roof, deep within the mine.

10. Mr. Markovitch testified that on November 16, for the first time, he observed flames and dense black smoke in Mine No. 1 and immediately notified MSHA.

Order 2710147 - WEVA 87-200

11. On January 2, 1987, MSHA Inspector Richard Herndon inspected the No. 1 coal conveyor belt tail roller and the No. 2 coal conveyor belt drive and head roller. These were aligned so that coal would move from the No. 2 belt onto the tailpiece of the No. 1 belt. The No. 2 head drive supplied power and torque to move the No. 2 conveyor belt.

12. The tailpiece of No. 1 conveyor housed a 20-inch diameter tail roller that rotated while the conveyor was in operation and extended 8 inches out from the tail piece. There was no guard over the roller; the exposed section of the tail roller was about 30 inches long, an area of about 290 square inches. The top of the tail roller was about knee level.

13. The head roller was about shoulder height and was 20 inches in diameter. It also was unguarded. The head roller was connected to the drive rollers by a conveyor belt, which also was not guarded. The length of exposed belt between the drive rollers and head roller was about 12 feet.

14. The drive motor for the No. 2 belt was provided with a gear guard, but the two drive rollers extended about four inches above the guarded motor and were exposed. These drive rollers rotated while the belt was in operation.

15. Individuals could accidentally come into contact with the above unguarded rollers and belt when they were in operation.

16. A walkway, with a maximum width of two feet, was adjacent to the No. 1 and No. 2 belts. It was used by persons coming to clean, monitor or service the belts. Persons using the walkway would be exposed to a hazard of slipping and falling into the belt drive, tail roller, drive rollers, or other exposed

moving parts. If an individual came into contact with such moving parts he or she could become entangled or pulled into the machinery causing a serious injury or even a fatality. At the time of inspection, the walkway was wet and slippery; this condition increased the likelihood of a slipping and falling accident.

17. No guards were provided for any of the rollers on the tight side of the No. 1 and No. 2 belts. Within reasonable probability, individuals assigned to perform clean-up or service operations on the tight side of the belts could have an accident and come into contact with a roller.

18. The conveyor belts were used between November 16 and the time of the inspection (January 2, 1987) to move supplies, such as parts, concrete blocks and bags of concrete, for the construction of fire seals. Workers who traveled near the belts were exposed to the unguarded moving parts. The mine was not in production during that period.

19. Respondent paid civil penalties for 20 violations from October 25, 1985, through November 15, 1986. No citations were issued during the above period for violations of 30 C.F.R. § 1722 or 30 C.F.R. Part 50. Of the 20 citations, 15 were assessed as significant and substantial violations. No violations were charged in 1984.

20. Respondent's Mine No. 1 produced 34,470 tons of coal in 1985 and 38,171 tons in 1986.

DISCUSSION WITH FURTHER FINDINGS

Citation 2699438

On November 11, 1986, Respondent discovered white or gray smoke deep within its Mine No. 1. It did not notify MSHA of a mine fire. It checked outside the mine to see whether local residents were burning trash near the intake fan entrance to the mine. There was no indication of a trash fire. Respondent still did not notify MSHA of a mine fire. Over the next several days, Respondent investigated a number of possible sources of a fire outside the mine, without contacting MSHA. On November 16 Respondent saw flames and black smoke deep within the mine and notified MSHA of a mine fire. By that time, Respondent had a major mine fire on its hands; the fire continued to burn, and it was not until January, 1987, that the fire was sealed off and controlled so that part of the mine could be re-opened for mining. After the fire was reported to MSHA, MSHA provided substantial technical and safety assistance to Respondent to investigate, seal off and control the fire.

The regulations provide that a mine operator "shall immediately contact...MSHA" if an "accident occurs" (30 C.F.R.

§ 50.10) and define reportable accidents to include "an unplanned mine fire not extinguished within 30 minutes of discovery" (§ 50.2(h)(6)).

I conclude that smoke, with a sooty smell, found deep within an underground coal mine is a reportable mine fire within the meaning of the regulations if its source is not discovered and extinguished within 30 minutes. After Respondent saw smoke in the mine, and checked outside the fan entrance to the mine, but saw no evidence of an external fire, it was clear that it would not be able to discover the source of the smoke and extinguish it within 30 minutes of discovery. Therefore, Respondent had a clear duty to notify MSHA of a mine fire on November 11 and on each of the following days through November 16.

I do not agree with MSHA's allegations of low gravity and low negligence as to this violation. I find that Respondent showed gross negligence on November 11 by failing to report smoke found deep within its mine.

This was a serious violation, because it jeopardized the safety of persons who might enter the mine after the smoke was first discovered. This could include Federal or state inspectors or other persons in addition to the two men who in fact entered the mine at various times from November 11 through November 16. By failing to notify MSHA immediately, Respondent attempted to arrogate to itself the authority to exclude MSHA from investigating a mine fire, providing technical and safety assistance and, if needed, giving directions to protect the safety of persons attempting to discover the source of the fire and to extinguish or control it.

Considering Respondent's size, compliance history, and the other criteria in § 110(i) of the Act, I find that a civil penalty of $400 is appropriate for this violation.

Order 2710147

Respondent contends that the regulation cited in this order (30 C.F.R. § 75.1722) does not apply to unguarded machine parts that are not moving or energized at the time of the inspection. I reject this narrow interpretation of the standard. A preponderance of the credible evidence shows that from November 16, 1986, until the time of the inspection, in January, 1987, Respondent operated the conveyor belts without the required guards to transport parts and equipment to seal or control the mine fire. Personnel were exposed to serious hazards of accidental contact with moving, exposed machinery parts, as shown in the Findings of Fact. The risk of injury was accentuated by the existence of a narrow walkway, with a maximum width of two feet, alongside the head and tail rollers and the fact that the walkway was also slippery and wet, creating a reasonably high risk of slipping and falling into or against the exposed moving

machine parts. I uphold the allegation of a "significant and substantial" violation.

I also uphold the allegation of an "unwarrantable" violation. The guards were not provided for a substantial period, from at least November 16 until the time of the inspection, January 2, 1987. The violative conditions were visible throughout that time and should have been corrected by Respondent before the January 2 inspection.

Considering all of the criteria for civil penalties in § 110(i) of the Act, I find that a civil penalty of $450 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The undersigned judge has jursdiction in these proceedings.

2. Respondent violated 30 C.F.R. § 50.10 as alleged in Citation 2699438.

3. Respondent violated 30 C.F.R. § 1722 as alleged in Order 2710147.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation 2699438 and Order 2710147 are AFFIRMED.

2. Respondent shall pay the above civil penalties in the total amount of $850 within 30 days of this Decision.

3. The parties' motion at the hearing to approve a settlement concerning Citations 2710148 (civil penalty of $85), 2710149 (civil penalty of $85), and 2710151 (civil penalty of $58) is GRANTED, and Respondent shall pay those additional penalties (a total of $228) within 30 days of this Decision.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 20, 1988

UNITED MINE WORKERS OF AMERICA ON BEHALF OF DONALD SHEEDER, TERRY MILLER AND DAN KUTRUFF, Complainants	:	COMPENSATION PROCEEDING
	:	Docket No. PENN 88-123-C
	:	Benjamin No. 1 Strip
v.	:	
BENJAMIN COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

The United Mine Workers of America, on behalf of complainants, has filed a motion to withdraw its complaint filed in this case on the grounds that complainants have been compensated for the time they were idled.

Accordingly, the motion is GRANTED and this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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Mr. John B. Martyak, Manager, Personnel/Safety, Benjamin Coal Company, La Jose, PA 15753 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

APR 21 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 88-46
	:	A.C. No. 46-03092-03678
v.	:	Beckley Mine
BECKLEY COAL MINING CO., Respondent	:	

ORDER OF DEFAULT

Before: Judge Broderick

On December 14, 1987, the Secretary of Labor filed a petition to assess civil penalties for alleged violations of the Federal Mine Safety and Health Act of 1977. Respondent did not file an answer to the petition.

On February 25, 1988, an order was issued to Respondent to show cause why it should not be deemed to have waived its right to a hearing and why the proposed order of assessment issued by the Secretary should not summarily be issued as the final order of the Commission. On March 4, 1988, Respondent filed "an informational response" to the order to show cause, advising that Respondent had filed a petition for reorganization under the Federal Bankruptcy Act. Respondent stated that it had been directed not to defend this proceeding. On March 8, 1988, the case was assigned to me. On April 8, 1988, Petitioner filed a Motion for Default Judgment. Respondent has not replied to the motion.

Therefore, IT IS ORDERED that Respondent is IN DEFAULT. It is FURTHER ORDERED that the penalties proposed in the Assessment Order attached as Exhibit A to the petition in the total amount of $750 are imposed as the final order of the Commission. IT IS FURTHER ORDERED that Respondent shall pay such penalties in the amount of $750 within 30 days of the date of this order.

James A. Broderick

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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DENVER, COLORADO 80204

APR 22 1988

RICHARD B. CURTIS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 88-99-D
v.	:	
	:	DENV CD 88-1
U.S. FUEL COMPANY, Respondent	:	

DECISION

Before: Judge Lasher

By letter to me dated April 12, 1988, the Complainant, Richard B. Curtis, indicated his desire to "discontinue" his case on the basis that he had received legal advice indicating that the basis thereof was "contractual."

Pursuant to this Commission's Procedural Rule 11 (29 CFR 2700.11) a party may withdraw a pleading at any stage of a proceeding with the approval of the Commission or the Judge.

Accordingly, good cause having been shown therefor, Complainant's letter is construed to be a motion to withdraw, such is granted, and this proceeding is dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Mr. Richard B. Curtis, 1632 Airport Road, Price, UT 84501 (Certified Mail)

Mr. Joseph H. Abbott, Manager, Industrial Relations, United States Fuel Company, P.O. Box A, Hiawatha, UT 84527 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 22 1988

JAMES NAPIER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 88-99-D
v.	:	
	:	No. 10 Mine
SHAMROCK COAL COMPANY, INC., Respondent	:	BARB CD 88-03

ORDER OF DISMISSAL

Before: Judge Fauver

Complainant's motion to dismiss his complaint is GRANTED, and this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 22 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 87-27
	:	A.C. No. 44-04856-03521
v.	:	
	:	Buchanan No. 1 Mine
CONSOLIDATION COAL CO., Respondent	:	

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Michael R. Peelish, Esq., Consolidation Coal Co., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary of Labor (Secretary) seeks a civil penalty for an alleged violation of 30 C.F.R. § 50.20(a) for failure to properly report an occupational injury occurring August 25, 1986, resulting in a lost workday. Respondent, Consolidation Coal Co. (Consol), denied the alleged violation. The parties agreed to submit the case for decision on the depositions of the injured miner, Timothy Smith, and Federal Mine Inspector Kenneth Shortridge, the exhibits submitted at the depositions, an affidavit of the superintendent of the subject mine, Joseph Aman, and the computer printout of Consol's assessed violation history from March 1, 1986 to February 29, 1988. (I do not know the relevance of these dates, but since the parties have agreed on a penalty amount if a violation is found, it is unimportant.)

On April 5, 1988, the Secretary filed a Motion for Summary Judgment with a Memorandum in Support of the Motion. On February 11, 1988, Respondent filed a Response in Opposition to the Motion. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Consol was the owner and operator of an underground mine in Buchanan County, Virginia, known as the Buchanan No. 1 Mine; Timothy Smith was employed at the subject mine as a miner. Smith worked the midnight shift as a general inside laborer. On August 25, 1986, at about 1:45 a.m., Smith's right little finger and thumb were injured when his hand was caught between two timbers. He left the mine and was driven to the Buchanan General Hospital. He was examined there by Dr. Yusuf Chanbhry. The diagnosis was fracture of the right hand fifth finger. He applied a splint and referred Smith to an orthopedist, Dr. Bendigo. Dr. Chanbhry stated that Smith was disabled for work and would be able to return to light work September 1, 1986, and to regular work September 15, 1986. Smith was driven back to the mine from Buchanan General, arriving between 4 and 5 a.m. The shift foreman told him to clean up and go home. However, Smith rode to and from work with two other miners, so he waited in the car for them. He was unable to sleep because the car was uncomfortable and his finger (thumb?) nail was throbbing. The shift ended at 8:00 a.m. and they left the mine about 8:45 or 9:00. Smith arrived home at about 9:30 or 9:45. He ate breakfast and called Dr. Bendigo's office. He received an appointment to see him at 2:00 p.m. the same day, and was instructed to have an x-ray taken at about 1:00.

Smith then went to bed and slept about an hour and a half. He drove to the office where the x-ray was taken, and then to Dr. Bendigo's office. He was seen by Dr. Bendigo at about 3:00 p.m.. The doctor put a cast on the hand running up to within about 3 inches of the elbow. He also drilled two small holes in the thumb nail which relieved the discomfort in the thumb. Smith was also given a prescription for pain medication, and told to return "in a couple weeks." He drove home, arriving at about 5:00 p.m. After eating dinner, he decided to call his supervisor to tell him he would not be in because he had not had much sleep. He called his shift foreman but was unable to reach him, so he called his utility foreman (his "immediate boss") and told him he would not be in. He did not tell him why. The foreman, who was aware of Smith's injury, merely said "okay." Smith testified initially that he merely told the utility foreman that he would not be in ("I just told him I wouldn't be in. And he said, 'okay'"). (Smith dep. 19) Later he testified that he told him he was going to take a "Consol day." (Smith dep. 22) It was Smith's normal practice to leave home for the mine at about "a little after 10:00 p.m.," and he would arrive at the mine about 11:00 or 11:15. He normally slept from about 10:00 a.m. to 5:00 or 6:00 p.m., a total of at least seven hours.

Smith began working at the subject mine in June 1986. When he was hired he was told that he would have two days off per year (known as "Consol days") which he could take whenever he wanted "as long as it didn't interfere with the company." Advance notice is not required, but a request to take a Consol day must be cleared with the shift foreman who has responsibility for ensuring that he has sufficient manpower on his shift. Consol does not provide sick leave, and at the time of his injury, Smith had not worked long enough to have earned vacation days.

When Smith returned to work the following day, the shift foreman asked if he could have worked the previous day. Smith stated that this was "the first time I had been confronted with the idea, that I sort of felt why is he asking me. And I said 'yes'." (Smith dep. 31) Smith continued working. He made an appointment to return to Dr. Bendigo, but did not keep it since he removed the cast himself and his finger "felt fine."

In April 1987, Federal Mine Inspector Kenneth Shortridge conducted a Part 50 audit at the subject mine, and reviewed the form 7000-1 submitted by Consol on Smith's injury. He asked why Smith did not work on the shift following the injury and was told that Smith had been up all day, asked for and was granted the next day off. Smith issued a 104(a) citation charging a violation of 30 C.F.R. § 50.20(a) because the form submitted by Consol indicated that the injury did not cause any lost workdays.

REGULATION

30 C.F.R. § 50.20(a) provides in part:

> * * * Each operator shall report each accident, occupational injury, or occupational illness at the mine . . . in accordance with the instructions and criteria in §§ 50.20-1 though 50.20-7.

30 C.F.R. § 50.20-7(a) provides in part that the operator shall:

> . . . Enter the number of workdays . . . on which the miner would have worked but could not because of occupational injury or occupational illness. The number of days away from work shall not include the day of injury . . . . . If an employee loses a day from work solely because of the unavailability of professional medical personnel for initial observation or treatment and not as a direct consequence of the injury or illness, the day should not be counted as a day away from work.

ISSUE

Whether the absence of an employee from work on the day following an occupational injury because necessary medical treatment on the day of the injury resulted in his loss of sleep constitutes a day away from work because of the occupational injury?

CONCLUSIONS OF LAW

Consol is subject to the provisions of the Mine Safety Act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding. The facts in this case are clear and uncomplicated. A miner received a significant injury to his hand at work. He was given initial medical treatment and referred for specialist treatment. As a result of the referral, he was awake during nearly all of the period when he usually slept. In fact, he slept for about one and a half hours. Because of his lack of sleep, he decided to take the following day off, although he testified that he could have worked. The employee's opinion that he could have worked is of some significance, but is not conclusive. In fact he did not work, and his failure to work is related to the injury because it is related to the medical treatment which was necessary because of the injury. I conclude that the employee's absence from work on August 26, 1986, resulted from his occupational injury on August 25, 1986.

The fact that the employee regarded the day off as a "Consol" day and that Consol so recorded it, is, of course, not determinative, or even relevant in deciding the issue whether the day away from work resulted from the injury.

Consol seems to argue that the day away from work resulted from the unavailability of professional medical personnel for initial observation and treatment and therefore should not be recorded as a day away from work resulting from the occupational injury. I do not so interpret the facts. Professional medical personnel were available for initial observation and treatment. Whether or not the referral to the orthopedist was part of the initial observation and treatment, the lost work day did not result from the unavailability of the orthopedist. The orthopedist was available. The lost work day resulted from the time spent receiving treatment and diagnosis, including necessary travel, all of which resulted in a loss of sleep. Therefore, I conclude that the lost workday resulted from the loss of sleep, which resulted from the necessary medical care which resulted from the injury. It should have been reported as a day away from work because of the injury. The citation properly charged a violation of 30 C.F.R. § 50.20(a).

The parties have stipulated that if I find a violation, the proposed penalty of $200 is an appropriate penalty under the statutory criteria. I accept the stipulation.

ORDER

Based upon the above findings of fact and conclusions of law, the Secretary's Motion for Summary Decision is GRANTED; Respondent is ordered to pay within 30 days of the date of this decision the sum of $200 for the violation found herein.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W COLFAX AVENUE SUITE 400
DENVER COLORADO 80204

April 25, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 87-114-M
	:	A.C. No. 05-00413-05517
v.	:	Bulldog Mountain Operations
HOMESTAKE MINING COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Charles W. Newcom, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Morris

This case is before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act") to challenge the issuance by the Secretary of Labor of a citation charging Homestake Mining Company, ("Homestake") with violating the regulatory standard at 30 C.F.R. § 57.18025.

A hearing on the merits took place in Denver, Colorado on December 2, 1987. The parties filed post-trial briefs.

Jurisdiction

As a threshold matter Homestake asserts its mine is not subject to the Act. Specifically, the uncontroverted evidence shows the Bulldog mine ceased all production on January 29, 1985. As a result it does not meet the definition of a "coal or other mine" under Section 3(h)(1) of the Act. In addition, even if it is deemed to be a "mine" this operation did not have products entering commerce and thus falls outside the coverage of Section 4 of the Act.

Discussion

The evidence in this case shows that Homestake, an underground gold and silver producer, has its principal place of business in California. In addition, it has at least two mines in Colorado (Bulldog Mountain Operation and North Amethyst Project). Further, Homestake's legal identity report shows it has a 20% or greater interest in 23 other mines (Ex. R4, R6).

These factors establish that Homestake is clearly subject to the Act and, as a matter of law, its activities affect commerce.

Homestake's narrow issue here concerning jurisdiction is that that the Bulldog mine had ceased all production almost 22 months before MSHA issued its citation. Homestake cites no persuasive authority in support of its view. 1/ Once an operator is subject to the Act its coverage does not cease at one of its individual mines merely because production stopped at that location. Contrary to Homestake's contention the Bulldog operation continued to be a "mine"; otherwise, why did the company direct its supervisor to maintain the pumps? Under Homestake's defense a miner would be protected one day during production but not the following day when production ceased. However, the Commission has clearly ruled that "[t]he Act provides an expansive definition of a "mine" which Congress stated must be given the 'broadest possible interpretation', with doubts resolved in favor of inclusion" Cypress Industrial Minerals Corp., 3 FMSHRC 1 (1981).

For the foregoing reasons Homestake's motion to dismiss for lack of jurisdiction is denied.

The regulation involved here provides as follows:

UNDERGROUND ONLY

§ 57.18025 Working alone.

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen.

Findings of Fact and Discussion

At the outset it is necessary to consider whether Homestake's supervisor was "working alone" under conditions where his cries for help could not be heard or where he could not be seen. If this is determined in the affirmative it is then necessary to consider whether "hazardous conditions" existed in the areas where he was working.

The uncontroverted evidence on the "working alone" issue is established by Homestake employee Bobby Rae Webb and confirmed by MSHA Inspector Lyle Marti.

BOBBY RAE WEBB, experienced in mining, was Homestake's chief electrician and foreman on December 10, 1986 when the contested

1/ Oatville Sand and Gravel Co., 5 FMSHRC 400, 405 (1983) merely holds that a mine in the process of shutting down still remains subject to the Act.

citation was issued at the Bulldog mine (Tr. 21-26, 115, 117, Ex. R7).

After production stopped on January 29, 1985, Webb was responsible for maintaining the mine and its pumps. No one worked for him at the mine (Tr. 29). However, one hundred fifty miners had been employed at the mine before production stopped (Tr. 29).

The 480 volt three phase insulated and protected pumps, the subject of Webb's inspection, consisted of two deep well pumps, one MRV pump and one fly pump. The cables carrying the electricity for the pumps were located on the same travelways used by Webb. When production terminated the company was short-handed and Webb personally began checking the pumps. He would check the pumps on Monday and Friday (Tr. 30-34, 103, 104, 112).

Webb's procedure was to advise Bev Larson, the company's Secretary in the main office, that he was going underground. She was located half a mile from the mine and if something happened she could send someone looking for him (Tr. 37). Usually Webb would say he'd be back in two hours. When he came back out Webb would advise her that he had returned. Occasionally Webb would also advise Don Rolfe he was going underground.

After advising Ms. Larson of his intentions Webb would get his cap-lamp and tag out. Thereafter he'd start the main fan, part of the ventilation system (Tr. 40, 86). There was also natural ventilation in the mine (Tr. 41).

Webb would then start the compressors to build up 125 pounds of air pressure in the piping system. This supplied air to the hoist and the air doors (Tr. 43).

During his tenure at the Bulldog mine the hoists have, on occasion, malfunctioned but no malfunction occurred during the time Webb inspected the pumps. The logs for the hoist probably weren't up to date. In addition, there have been power outages in certain parts of the mine (Tr. 142, 143, 146).

Depending on whether he rode the locomotive or a bike it took five to ten minutes to go from the portal to the hoist, a distance of about 5000 feet. At the hoist another air compressor was started. If a power failure occurred the compressors would shut off (Tr. 44, 45).

After waiting a few minutes for a pressure buildup from compressed air Webb would descent 360 feet in the hoist to the 9000 foot level (Tr. 46, 88). He would then exit the hoist and go approximately 5000 feet to inspect the furthest water pump (Tr. 48). He would then return on an electric locomotive to the next pump station 3000 to 4000 feet away (Tr. 49, 50).

Webb wore rubber boots and the pumps were submerged in water (Tr. 51, 105).

To reach the third pump it was necessary to leave the main drift and go 400 or 500 feet down a crosscut (Tr. 52, 53). Webb could usually do his "tour" in less than two hours, normally 85 minutes (Tr. 54, 55).

After the stripping of the mine had been completed there were no other miners in the mine during Webb's inspections. In addition, no one could see or hear him 2/ (Tr. 56).

The routes taken by Webb were travelways and under normal operating conditions you could expect to see other miners in these areas (Tr. 66, 76, 77). But even when the mine was active it could be much longer [than two hours] before someone would come looking for the individual checking the pumps (Tr. 110).

The telephones were stripped out of the mines after production stopped. But Webb could not recall when the phones were removed (Tr. 70). He did not carry a pager so there was no way he could have reached the surface when he was underground. Nor was there anyway the surface could communicate with him (Tr. 70, 71).

If Webb broke a leg while underground he would either crawl out or his secretary would send someone to look for him (Tr. 71). Anyone searching for him would not know his whereabouts but they would know the route he was traveling (Tr. 72, 111).

None of the first aid supplies had been removed from the mine (Tr. 75). But they were removed the week before the mine was flooded (Tr. 76).

This was not a gassy mine and the ventilation system provided fresh air for miners (Tr. 80, 87). Webb has no ventilation training but he could feel air on his face and he concluded the mine was ventilated by some kind of chimney effect (Tr. 84, 90, 131). On his inspections he did not carry a flame safety lamp (Tr. 87). He could not hear the fan running at all times while he was underground (Tr. 90).

There were lights at various pump stations. Also there were signal lights down the drifts but no overhead lighting (Tr. 89). Webb and the inspector used cap lights (Tr. 90). None of the lights had been removed in any part of the mine (Tr. 146, 148).

Webb did not keep a bar with him to test any loose (Tr. 93). During the 20 month period the mine was inactive dust accumulated on the back and roof (Tr. 93). The accumulation made it more

2/ For a drawing of Webb's extensive route see Exhibit P1 (Tr. 56-66).

difficult to make a visual determination of the loose (Tr. 94). Webb didn't know if any loose had been barred down during the time he inspected the pumps (Tr. 94). He himself had not done any barring down but if he had observed any bad ground he would have reported it (Tr. 112, 120).

Webb was familiar with the escapeway for the mine but he didn't know the contents of the written escape plan (Tr. 99, 100). There was one mine map at the 9360 hoist and other places. But Webb didn't know the extent to which they were updated (Tr. 100, 101).

The lack of a communication system prevents a miner from being advised of a potential emergency (Tr. 102). The inspector did not comment about any hazard he had observed (Tr. 124, 125). While underground Webb never exposed himself to any hazards that he recognized (Tr. 144).

The Commission has previously reviewed the "working alone" regulation. Specifically, in construing 30 C.F.R. § 57.18-25 (the unchanged predecessor from 30 C.F.R. § 57.18025) the Commission observed that the regulation does not prohibit employees from working alone. Further, hazardous conditions do not automatically exist merely because an employee is "working alone", Cotter Corporation, 8 FMSHRC 1135 (1986).

In Cotter the Commission did not consider the issue of hazardous conditions but addressed "the crucial issue of whether Lopez [the miner] had sufficient contact with other [Cotter] miners" within the meaning of the regulation . Specifically, according to the Commission, the precise issue presented before them was whether the contact between Lopez and the other Cotter employees was (1) of a regular and dependable nature and (2) commensurate with the hazard presented.

After considering the evidence the Commission concluded that the presence of other Cotter workers "was in general accord with a plan to provide periodic contact with Lopez on a regularized basis."

In the case at bar there was no periodic contact whatsoever between Homestake and Webb. At best the evidence shows Webb would advise the Homestake secretary, Bev Larson or his supervisor, that he was going underground. If he did not return in two hours [3]/ she was to advise other authorities to organize a search party.

3/ A credibility issue arises as to the length of time it normally took Webb to complete his inspection. Considering the conflicting testimony of Webb and Marti and the distances involved, as well as possible varying methods of travel, I conclude the pump inspection trip would normally take two to three hours.

Merely advising the Homestake secretary that he was going underground did not constitute communication or contact of a regular or dependable nature as required by the regulation. Further, it is obvious that any cries for help by Webb could not be heard nor could he be seen while he was underground.

Mr. Robertson, Webb's supervisor, testified he knew when Webb was going underground. In addition, they would go look for him if he didn't return. Mr. Robertson's involvement, with a paucity of supporting evidence, is basically on the same level as the company's secretary.

Accordingly, I conclude that Webb was "working alone" within the meaning of 30 C.F.R. § 57.18025.

In its post-trial brief Homestake relies on Cotter Corporation, and Old Ben Coal Company, 4 FMSHRC 1800 (1982). However, for the reasons stated above these cases support the Secretary and not Homestake.

Further Findings and Discussion

The Commission has previously observed that the Secretary may promulgate standards prohibiting certain tasks from being performed alone Cotter Corporation, 8 FMSHRC at 1137 (footnote 3).

However, the pivotal issue here is whether there existed "hazardous conditions" 4/ in the Bulldog mine that would endanger Webb. Inspector Marti's testimony addresses these issues. The hazards, as envisioned by the inspector involved lighting, lack of communication, electrical shock, ventilation, ground conditions, escapeways, and the non-operating status of the mine.

Lyle K. Marti, a person experienced in mining, has been an MSHA inspector since 1975 (Tr. 151-156, 179, 183, 184).

On December 10, 1986, he inspected Homestake's Bulldog mine. It was a regular inspection as mandated by the Act (Tr. 156).

Mr. Marti accompanied Webb on his inspection of the pumps. They followed the general route and procedures as described by Webb in his testimony (Tr. 157). The inspection took three to three and one-half hours. In a non-stop effort the area could be covered in two hours (Tr. 160). If a hazard existed then both the inspector and Webb were exposed to it (Tr. 222).

There were no lights in the area. The men used cap lamps for the four miles they traveled (Tr. 161). At the cage the two

4/ "Hazardous" has been defined as [e]xposed to or involving danger; perilous; risky." Black's Law Dictionary 647 (5th ed. 1979).

men discussed the fact that the hoist logs were not being maintained (Tr. 162). One man could not conduct the hoist inspection properly because the controls were not in the same area as the cage (Tr. 163).

After the men left the hoist at the 9000 foot level they had a lengthy discussion about Webb's inability to communicate with the surface if he discovered a hazard, such as a fire. The telephones had been removed (Tr. 164, 166, 173). All mine rescue systems are built around communications.

Webb normally went underground on Monday, Wednesday and Fridays. Webb would also tell his wife whenever he was going underground alone (Tr. 164, 173). He expressed to Marti a specific concern about his safety in working alone. He also was worried about his secretary's memory (Tr. 165).

They mentioned the possibility of electrical shock and the lack of any person to render first aid (Tr. 167). No citation was written for any electrical hazard and Marti agreed he wasn't an expert in the electrical field (Tr. 232, 250).

Mr. Marti observed that at the junction of three crosscuts there was no stopping. This condition could create a short circuit of air (Tr. 167, 168). No citation was written but if a short circuit occurred there would be insufficient oxygen with resulting loss of consciousness (Tr. 168, 218). Two air samples taken by Marti; when analyzed at a later time they showed the air had sufficient oxygen content (Tr. 238, 241, 242, Ex. R8). In the inspector's opinion no one could determine how long the power would be off before the oxygen level became deficient (Tr. 247). In any event the inspector did not consider himself to be an expert in ventilation (Tr. 250). Without other miners in the area no one would be available to check the ventilation or repair it (Tr. 169). At the closeout conference no one disagreed with Marti's assessment of the short circuiting of the ventilation and they agreed the mine map was out of date. The company representatives were non-committal about the lack of communication, and the buildup of dust on the ribs and back (Tr. 170, 171). Marti wrote citations for "working alone" and the "escape plan" (Tr. 171).

In Marti's opinion the lack of production in the mine dramatically increased the hazards to Mr. Webb (Tr. 172).

There was no equipment in the mine to sound the ribs and back (Tr. 201). An abnormal amount of dust had settled on the ribs and backs. This accumulation obliterated the inspector's ability to make a visual determination as to whether these areas were sound (Tr. 202, 203, 225, 229). If you don't visually determine if ground is bad you normally don't test it (Tr. 203). In fact, no bad ground was observed (Tr. 226, 228, 231).

The mine escape plan was not adequate. An additional development was not shown on the map. An updated plan would show the flow of air, telephones and the location of emergency equipment (Tr. 204). If anything happened to Webb his rescuers wouldn't know his whereabouts (Tr. 205). There were no signs pointing to escapeways (Tr. 206). It was not known when the escapeway had been last traveled (Tr. 207). It is the responsibility of the mine manager to check and maintain the escapeways (Tr. 208). If the escapeways hadn't been checked no one would know whether they were even passable (Tr. 209, 210).

Mr. Marti felt the two citations he issued, when considered with the recommendations as to ventilation and the follow up procedures, were sufficient (Tr. 212). He didn't write additional citations because he has always received good cooperation from mine management (Tr. 249).

The inspector considered that the hazards confronted when Webb was underground alone were significant and substantial (Tr. 217).

In the inspector's opinion, in determining the hazard it makes a difference whether a mine is operational or shut-down (Tr. 252, 259).

Thomas M. Robertson testified for Homestake. He is a person experienced in mining and currently the general manager at the Bulldog Mountain Operation (Tr. 277-278, 284). There were no lost time accidents underground in 1983, 1985, 1986 or 1987. In 1984 there was one lost time accident when a miner broke his finger (Tr. 279). The mine received safety awards for 1983, 1984 and 1985 (Tr. 280, 281).

After production was stopped in the mine all explosives were removed, and all tools were brought to a central location. In the two years before the shut-down about 70 miners worked underground.

The witness was not aware of any tests by the company or MSHA that showed bad air (Tr. 281, 282).

After the mine closed MSHA continued its inspections but the emphasis was on the North Amethyst mine. No citations were ever written for conditions underground (Tr. 282, 283).

Mr. Robertson always asked about Webb's whereabouts in the mine.

On December 10, 1986, the existing escapeway maps covered the area involving Webb's route to the pumps (Tr. 283).

Since the shut-down in January 1985 Robertson has been in the underground area four times [5]/ (Tr. 285)

In Robertson's opinion Webb was not exposed to any hazard when he inspected the pumps without being accompanied by another person. This is so because he was traveling in a known area where the air was known to be of good quality. Further, the company knew the duration of the visit and the ground conditions were good (Tr. 285). In addition, Webb has good mining experience and was reliable; further, he was a staff supervisor (Tr. 286).

Mr. Robertson did not observe any excessive buildup of dust. There was nothing that would limit a person's ability to assess the ground conditions (Tr. 287).

At the time of the hearing Robertson only had 16 employees. As a result he would be responsible for knowing whether Webb was going into the mine (Tr. 291). It would be important to know when Webb came back out of the mine. If he didn't appear they would go after him (Tr. 292).

Evaluation of the Evidence

The record here addresses several areas of alleged hazardous conditions. As previously noted, these areas, with their varying degrees of complexity involve lack of lighting, lack of communication, electrical shock, ventilation, ground conditions, escapeways and the non-operating status of the mine.

Homestake's broad view is that none of the "hazards" enumerated by Inspector Marti triggered application of 30 C.F.R. § 57.18025. It is, accordingly, necessary to review the evidence in further detail.

Concerning the lack of lighting [6]/: Mr. Marti failed to present any credible evidence that the lights were not

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5/ The witness also testified he had been underground 12 to 15 times since the shut-down (Tr. 286).

6/ This is not an enforcement proceedings but the relevant regulation is § 57.17001 which provides :

Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.

Further, § 57.17010 Electric lamps provides:

Individual electric lamps shall be carried for illumination by all persons underground.

functioning. I credit Webb's contrary testimony that the lights were in place and functioning, just as when the mine was active. Company electrician Webb would be particularly attentative to the lighting conditions. As chief electrician he should have been in charge of removing the lights.

Concerning the lack of communications: It is uncontroverted that the telephone system had been removed from the mine before the inspection. Webb's situation underground was that he could not contact anyone outside the mine and, conversely, they could not contact or respond to him.

In recently reviewing the two way communication requirement (pertaining to underground coal mines) the Commission observed that "(t)he obligation imposed on an operator by the requirement of 30 C.F.R. § 75.1600-1 that there be an outside person to respond to miners underground in the event of an emergency is an important requirement and any violation of the standard has serious safety implications". Harlan L. Thurman v. Queen Anne Coal Co., 10 FMSHRC 131 (1988).

The parallel regulation affecting Homestake's underground metal and non-metal mine is contained in 30 C.F.R. § 57.18013 7/. While this case is not an enforcement proceeding for the violation of the communication regulation I find that the Commission's statements constitute persuasive support for the view that the lack of a communication system was a hazardous condition that could endanger Webb while performing work underground.

Homestake asserts that Inspector Marti did not issue a citation for this condition nor did his concern for communications stop him from conducting the inspection.

As noted the issue here is whether "hazardous conditions" existed. The issuance of a citation for a violative condition is not a condition precedent for the proof necessary to establish a violation of § 57.18025. I further agree that at no time was Webb ever trapped by a fire. But merely because he was not involved in such a dynamic event his work environment was nevertheless hazardous.

Homestake's position is that its personnel on the surface knew when, where and how long Webb would be underground. This argument overlooks the key reason why the condition was hazardous -- there was a lack of communication between surface and underground.

7/ § 57.18013 provides that "A suitable communication system shall be provided at the time to obtain assistance in the event of an emergency".

Homestake claims Webb had greater contact with the surface after the production shut-down than before. I disagree. Webb had no communication whatsoever with the surface after the communication system was removed.

Concerning electrical shock: no credible evidence indicated the pumps and electrical equipment were hazardous. 8/ Inspector Marti admitted his lack of electrical expertise.

Concerning ventilation: at the start of his many inspections Webb would turn on the ventilation. The relevant regulation, 30 C.F.R. § 57.8527, does not require oxygen deficiency testing. However, the air in all active workings shall contain at least 19.5 percent oxygen (30 C.F.R. § 57.5015). The inspector's test, analyzed after the inspection, indicated an oxygen concentration of 20.85 percent (Exhibit R8). The mine has a history of adequate air and, in addition to its ventilation system, it appears to be naturally ventilated.

The foregoing factors cause me to reject the inspector's opinion and conclude that no hazardous conditions existed due to inadequate ventilation (Tr. 189-191).

In their trip underground the two men carried self-contained respirators but the one hour rescuers would be insufficient from the depth of the mine (Tr. 196-199).

Concerning the ground conditions: I find from the credible evidence that an accumulation of dust obliterated the inspector's ability to inspect the back and ribs. However, no bad ground was ever observed. The related regulations, 30 C.F.R. § 57.3022 and § 57.18002, require examination of working places and adequate action, if necessary. However, on this record, no conditions existed that could have endangered Webb while underground alone.

Concerning the escapeways: the inspector issued a non S & S citation for the failure of Homestake to maintain a current escape plan (Exhibit R9). The citation was not contested. However, I find from the credible evidence that the citation was issued because the mine map failed to include a development unrelated to Webb's routes. However, additional evidence by Inspector Marti is uncontroverted: An updated mine map would show the flow of air, as well as the location of telephones and emergency equipment. Further, there were no signs pointing to escapeways. The failure to provide this escapeway information subjected Webb to hazardous conditions within the meaning of § 57.18025.

8/ For electrical requirements see Subpart K - electricity, 30 C.F.R. § 57.12001 et seq.

Concerning the non-operating status of the mine: the inspector expressed the opinion that an added element of hazard resulted from the fact that the Bulldog was not operating. The Commission condemned such a view of the "working alone" regulation in Cotter Corporation, 8 FMSHRC at 1137. In short, the Secretary is obliged to show that hazardous conditions existed, they cannot be presumed because the mine is not operating.

Homestake contends the citation should be invalidated because of MSHA's interpretative statement. The statement, after citing the "working alone" regulation reads as follows:

> APPLICATION: This standard is applicable where hazardous conditions exist, such as in development headings, stopes, pillar recovery, shafts and raises, and any area where timber repair or ground control work is required or any unusual measures are necessary to alleviate hazards.
>
> This standard should not be applied to work conducted in areas where the environs have been made safe and are kept well maintained such as is normally found at shaft landings, underground pumprooms, hoist rooms, repair and maintenance shop areas, magazine sites, and travelways that are provided with safeguards, clearances or shelter holes and warning devices.
>
> This standard does not apply to examinations of areas of the mine or working places by qualified personnel such as fire bosses, shift bosses, foremen and safety personnel unless unsafe conditions are known to exist prior to such examination and unless such personnel would be endangered by such examination.
>
> Exhibit R1

Contrary to Homestake's views I conclude the initial paragraph is not applicable. The failure to provide a communication system and proper escapeway information, as previously stated, establishes conditions that are hazardous.

The second paragraph does not assist Homestake because those defective situations must have been known to Homestake since the company had removed the system and failed to update the mine map.

On the same basis the third paragraph of the Secretary's bulletin is not applicable.

In any event, MSHA policy is not binding on the Commission, Old Ben Coal Company, 2 FMSHRC 2806 (1980); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986).

The citation should be affirmed.

Civil Penalty

The statutory criteria to access civil penalties is contained in section 110(i) of the Act.

The evidence shows that for the two years before the contested citation was issued 13 violations were assessed against Homestake's Bulldog Mountain Operations (Ex. P2). Inasmuch as it has an interest in 23 other mines, the company should be considered a large operator. The company was negligent in that it removed the communication system and failed to update the mine map. In the absence of any facts to the contrary I conclude that the payment of a penalty will not cause the operator to discontinue its business. Buffalo Mining Co., 2 IBMA 226 (1973) and Associated Drilling, Inc., 3 IBMA 164 (1974). The gravity of the violations were high since Webb could have been trapped underground due to either condition. The operator should be credited with statutory good faith since it abated the violative conditions.

On balance, I deem that a civil penalty of $100 is appropriate.

ORDER

Based on the foregoing findings of fact and conclusions of law it is hereby ordered that:

Citation No. 2638753 is affirmed and a civil penalty of $100 is assessed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 28 1988

KAISER COAL CORPORATION Applicant	:	APPLICATION PROCEEDING Docket No. WEST 88-131-R
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Sunnyside 1, 2 & 3 Mines
and	:	
UNITED MINE WORKERS OF AMERICA Intervenor	:	

DECISION

Appearances: John A. Macleod, Esq. and Susan E. Chetlin, Esq., Crowell & Moring, Washington, D.C., for Applicant; Thomas Mascolino, Esq., and Edward H. Fitch, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia for Respondent; Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for the Intervenor.

Before: Judge Melick

This case is before me upon the application of Kaiser Coal Corporation (Kaiser) for a declaratory judgment holding that the regulatory standard at 30 C.F.R. § 75.326 does not operate to prohibit two-entry mining at its Sunnyside Nos. 1, 2, and 3 mines. Commission jurisdiction to grant declaratory relief exists under section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), the "APA". Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447 (10th Cir. 1983). Such authority is discretionary but may be used "to terminate a controversy or remove uncertainty." Section 5(d) of the APA, Climax, supra., at p. 452. Specific authority for these proceedings to be conducted before a Commission Administrative Law Judge is granted under section 113(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act."

The Sunnyside mines opened in 1896 and began longwall mining operations with two-entry gateroads in 1960. Two-entry mining has apparently continued at the Sunnyside mines until recently.

On September 11, 1985, the Federal Mine Safety and Health Administration (MSHA) notified Kaiser that it was "re-examining certain of its policies and practices regarding operators' use of belt haulage entries as ventilation entries, and particularly the application of 30 C.F.R. § 75.326 to mines opened prior to March 30, 1970."[1/] This notification was apparently the result of MSHA's reevaluation of two-entry mining following the 1984 fire at the Wilberg mine. MSHA further informed Kaiser at this time "that in all future mining areas sufficient entries can be developed so as to permit adequately the coursing of intake or return air through such entries without utilization of the belt entry" and that Kaiser could no longer develop two-entry gateroads at its Sunnyside mines without a granted petition for modification under section 101(c) of the Act.[2/]

[1/] The regulatory standard at 30 C.F.R. § 75.326 tracks the language of section 303(y)(1) of the Federal Coal Mine Health and Safety Act of 1969, which was effective March 30, 1970, and later reenacted as Section 303(y)(1) of the Federal Mine Safety and Health Act of 1977. As relevant hereto it provides as follows:

> Whenever an authorized representative of the Secretary finds, in the case of any coal mine opened on or prior to March 30, 1970, which has been developed with more than two entries, that the conditions in the entries, other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries, (a) the belt haulage entries shall not be use to ventilate, unless such entries are necessary to ventilate, active working places, and (b) when the belt haulage entries are not necessary to ventilate the active working places, the operator of such mine shall limit the velocity of the air coursed through the belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane.

[2/] Section 101(c) provides as follows:

Upon petition by the operator or the representative of miners, the Secretary may modify the appliction of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall

Kaiser thereafter on January 3, 1986, filed a petition for modification of section 75.326, with the Secretary of Labor. On October 27, 1987, the Secretary's representative, MSHA's Administrator for Federal Mine Safety and Health granted the Kaiser petition. The United Mine Workers of America (UMWA) thereafter filed a request for hearing to challenge that decision before a Department of Labor Administrative Law Judge. See 30 C.F.R. § 44.20- § 44.32. Kaiser's application for relief pending appeal to effectuate MSHA's grant of the Petition during the pendency of the Department of Labor proceeding, was denied on April 22, 1988. Kaiser argues that based on past experience in which a similar petition for modification of the same regulatory standard has been pending for more than a year before a Labor Department Judge, a similar delay in disposition of its present petition may reasonably be expected.

Kaiser further argues that in order to maintain the proper mining sequence, two-entry development mining must resume at the Sunnyside mines during the latter part of April, 1988. It points out that it is already in Chapter 11 status under the bankruptcy laws and cannot withstand a prolonged idlement while the merits of its petition for modification are being "debated" in further Labor Department review proceedings. It therefore urges that declaratory relief be granted and that section 75.326 should be held not to prohibit two-entry mining at the Sunnyside mines.

When declaratory relief will not be effective in terminating the underlying controversy it should generally be denied. See Greater Los Angeles Council on Deafness, Inc., v. Zolin, 812 F.2d 1103 (9th Cir. 1987); U.S. v. State of Washington, 759 F.2d 1353,

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2/ (continued)
publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of such operator or representative or other interested party, to enable the operator or the representative of miners in such mine or other interested party to present information relating to the modification of such standard. Before granting any exception to a mandatory safety standard, the findings of the Secretary or his authorized representative of the miners at the affected mine. The Secretary shall issue a decision incorporating his findings of fact therein, and send a copy thereof to the operator or the representative shall be made public and shall be available to the representative of the miners, as appropriate. Any such hearing shall be of record and shall be subject to section 554 of Title 5 of the United States Code.

(9th Cir. 1985) cert. den., 106 S.Ct. 407. In this case, regardless of the decision, the underlying controversy would not be terminated. Thus even assuming, arguendo, that I should find section 75.326 inapplicable to the Sunnyside mines, Kaiser would nevertheless still find it necessary to obtain the Secretary's approval before engaging in two-entry mining through the process of submitting ventilation and roof and rib-control plans for approval. While such plans had been approved for two-entry mining in the past MSHA has made it clear that it would be compelled to evaluate anew any plans for future two-entry mining. (Tr. 50, 56-60). Thus even a decision in this case favorable to the mine operator would not terminate the underlying controversy and declaratory relief is accordingly inappropriate.[3/]

The UMWA also maintains that even should section 75.326 be found inapplicable to the Sunnyside mines, the application of another regulation (30 C.F.R. § 75.1704) would nevertheless prohibit mining without separate and distinct escapeways ventilated with separate splits of air (See UMWA's Response to Kaiser Coal Corporation's Application for Declaratory Relief and Cross Application for Declaratory Relief pp. 5-6). Indeed the UMWA maintains that should section 75.326 be found inapplicable to the mines at issue then further declaratory proceedings will be necessary to determine the applicability of section 75.1704. It is therefore apparent that the underlying controversy herein i.e. the use of two-entry mining at the Sunnyside mines, would not be resolved solely on the basis of a determination of the applicability of section 75.326. The litigation would only continue on new issues. For this additional reason declaratory relief is inappropriate.

Finally, it appears that a comprehensive solution to the underlying conflict may soon be reached in the section 101(c) modification proceedings now pending before a Department of Labor Administrative Law Judge. The case reportedly is on a "fast track", a pretrial conference is scheduled to be held within a few weeks, and trial may commence as early as this June (Tr. 20-24). It is accordingly reasonable to expect resolution of that case in the near future with a comprehensive solution to the underlying conflict. See Wright and Miller, Federal Practice and Procedure: Civil, §§ 2758 and 2763. Those proceedings also provide the UMWA with an opportunity to participate as a party in

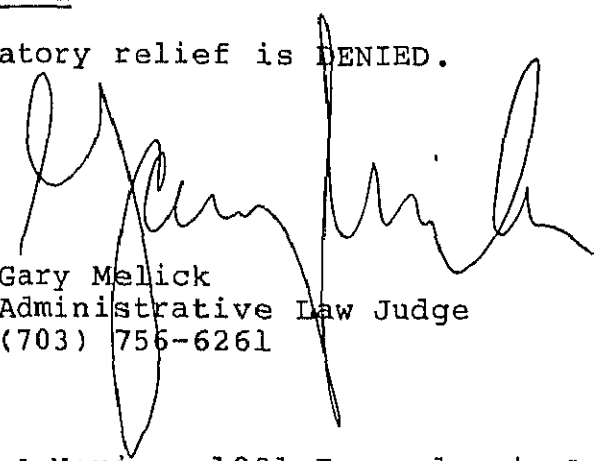
3/ In light of the history of the underlying issue it is also likely of course that any final resolution of this case would be delayed for years as the case works its way through the appellate process.

the resolution of an issue of particular concern to the miners who must ultimately work in the affected mines.

Under the circumstances I do not find this case to be an appropriate one in which to consider declaratory relief.

ORDER

The application for declaratory relief is DENIED.



Gary Melick
Administrative Law Judge
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APR 29 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 87-65-M A.C. No. 23-01670-05504
v.	:	Missouri Rock Plant No. 2
MISSOURI ROCK, INC., Respondent	:	

DECISION

Appearances: Tobias B. Fritz, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner; James L. Burgess, Esq., Johnson, Lucas, Bush, Snapp & Burgess, Kansas City, Missouri, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In this proceeding, the Secretary of Labor (Secretary) seeks civil penalties for three alleged violations of the mandatory safety standard contained in 30 C.F.R. § 56.9003. Respondent challenges the allegations that the violations occurred, and contests the proposed penalties as excessive. Both parties engaged in pretrial discovery. Pursuant to my prehearing order, the Secretary filed its responses on November 30, 1987. It listed its witnesses as Eldon Ramage, Richard Laufenberg, and Representative of Caterpillar Tractor Co. (specific identity as yet unknown). Respondent filed its response on December 1, 1988, and listed its witnesses as W. A. Ellis, Jesse B. Case, Merrill Gordon, John Strosnider, Jim Fiser, Bill McClanahan, and Ken Messerli. I issued a notice of hearing on December 7, 1987, scheduling the matter for hearing commencing February 10, 1988, in Kansas City, Missouri. On February 8, 1988, I received copy of a letter from counsel for the Secretary to counsel for Respondent informing him that John L. Robinson, an employee of Everett Quarries, would testify on the Secretary's behalf pursuant to subpoena, "in lieu of a representative of Caterpillar Co., as indicated in the prehearing exchange." On February 8, 1988, Respondent filed a motion to exclude the testimony of John L. Robinson.

The case was called for hearing on February 10, 1988, in Kansas City, Missouri. The parties argued the motion to exclude on the record, prior to the calling of any witnesses. I reserved my ruling on the motion and stated that I would permit the Secretary to call Mr. Robinson and would rule on the admissibility of his testimony when I decided the merits of the case. Counsel for Respondent them indicated that he wished to call a Robert Matter to testify; the Secretary objected and I again ruled that he would be permitted to testify, and I would rule when I decided the case, whether the testimony was properly received.

Eldon E. Ramage and John Robinson (in rebuttal) testified on behalf of the Secretary. Kenneth Messerli, William Ellis, Robert Matter, Merrill Gordon, Jesse Case and William McClanahan testified on behalf of Respondent. Both parties filed posthearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

MOTION TO EXCLUDE TESTIMONY

As I indicated earlier, each party has engaged in pretrial activity. My prehearing order was originally issued on August 28, 1987, and required responses, including disclosure of the names of witnesses, by October 30, 1987. By order issued October 5, 1987, I extended the time to November 30, 1987. Responses were filed by both parties, and on December 7, 1987, I issued the notice of hearing for February 10, 1988. The failure of counsel to notify each other and the court of the identity of proposed witnesses Robinson and Matter precluded the possibility of their being interviewed or deposed. No sufficient justification for the failure to disclose the names of the witnesses has been advanced. (I reject the notion that Robinson's identity is protected under 29 § C.F.R. 2700.59 as a "miner witness"). Therefore, I will not consider the testimony of either Robinson or Matter in making this decision.

FINDINGS OF FACT

Respondent was at all pertinent times, the owner and operator of a limestone quarry in Clay County, Missouri. During the calendar year 1986, 26,527 man hours were worked at the mine. In the 24 month period prior to the citations and orders involved in this case, there were two paid violations of mandatory health and safety standards at the mine. The penalties proposed herein would not affect Respondent's ability to continue in business.

On February 3, 1987, Federal Mine Inspector Eldon Ramage performed a regular inspection of the subject mine. Caterpillar

tractor scraper No. 643 was removing overburden in the Northwest corner of the quarry. The terrain was relatively hilly, with a 10 to 15 percent grade between the cut and the fill. The inspector wished to test the brakes on the scraper and directed the driver to apply brakes while the equipment was moving. The scraper was on a slight downgrade at the time. The driver dropped the pan and the unit stopped. The Inspector then directed him to stop by using the wheel brakes. The wheel brakes did not stop the vehicle. The driver stated that he had no air pressure for the wheel brakes. The Inspector then issued citation 2846910 charging a violation of 30 C.F.R. § 56.9003 for failure to provide adequate brakes on powered mobile equipment. The citation directed that it be corrected by February 4, 1987. On February 20, 1987, the Inspector modified the citation, increasing his evaluation of the gravity of the violation and denominating the violation as significant and substantial. The original citation was served upon Merrill Gordon, Respondent's safety director, who accompanied the inspector. He had the scraper sent to the mechanics. The Superintendent Jesse Case left on vacation at the end of the week and apparently did not tell his successor about the brake problem on the scraper.

On February 25, 1987, Inspector Ramage returned to the mine. He had scraper 643 tested and again found that it had no brakes. He issued a 104(b) order for noncompliance with the previous citation. He also tested scrapers 648 and 641 which were being operated in the quarry stripping overburden, and found that they had inadequate wheel brakes. He thereupon issued citations 2846916 and 2846917.

All of the scrapers are operated both in the quarry and in the parking area where maintenance work was performed.

The scrapers weigh about 35 tons empty. A fully loaded pan or bowl weighs an additional 35+ tons. Respondent's equipment operators customarily stop the unit by dropping the bowl. The wheel brakes, in Respondent's practice, are used only when moving the equipment from one location to another.

After the order and citations were issued on February 25, 1987, the brakes were repaired and the citations and order were terminated on March 16, 1987.

REGULATION

30 C.F.R. § 56.9003 provides:

> Powered mobile equipment shall be provided with adequate brakes.

ISSUES

1. Whether the fact that a powered mobile tractor-scraper can be and ordinarily is stopped by dropping the pan or bowl establishes that the scraper is provided with adequate brakes?

2. If the violations charged are established, what are the appropriate penalties.

CONCLUSIONS OF LAW

JURISDICTION

Respondent is subject to the provisions of the Federal Mine Safety and Health Act (the Act) in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

VIOLATION

The scrapers cited in this proceeding were clearly powered mobile equipment. The wheel brakes or service brakes were clearly defective. Respondent's position is that the pan or bowl provided adequate brakes.

The term "brake" is defined in the American Heritage Dictionary of the English Language (New College Edition 1976) as:

> 1. A device for slowing or stopping motion, as of a vehicle or machine, especially by contact friction.
> 2. Often plural. Any check that slows or stops action.

The same term is defined in A Dictionary of Mining, Mineral and Related Terms (U.S. Dept. of the Interior 1968) in part as

> A device (as a block or band applied to the rim of a wheel) to arrest the motion of a vehicle, a machine or other mechanism and usually employing some sort of friction. . .

In an early case under the Act, a caterpillar loader was found to have a substantial air leak in its braking system. The mine operator was charged with violating 30 C.F.R. § 56.9-2 which requires that equipment defects affecting safety be corrected before the equipment is used. In affirming the citation, Commission Judge Koutras rejected as a defense "Respondent's arguments and suggestions that the loader could be stopped by dropping and dragging the bucket or by using the transmission." Secretary v. Evansville Materials, Inc., 2 FMSHRC 2321, 2326

(1980). In the case of Mineral Exploration v. Secretary, 6 FMSHRC 316 (1984), Judge Morris considered citations charging two scrapers with having inadequate brakes. The scrapers were also equipped with retarders. In upholding the citations, the Judge said at page 321:

> I conclude that retarders under certain conditions will reduce an engine's RPMs and, consequently, they will reduce the speed of a vehicle. However, down shifting the transmission on an automobile also will reduce its speed but no one considers that a transmission is part of a braking system.

In the recent case of Secretary v. Brown Brothers, 9 FMSHRC 636 (1987) involving a citation for inadequate brakes on a truck, Judge Koutras said at page 656:

> The fact that the respondent used a variety of methods to stop the truck is irrelevant.

In the same case, MSHA's argument that "'Adequate brakes' clearly requires at least service brakes and not the use of other methods or the ingenuity of the employee to stop a vehicle" was adopted by the Judge. Id. at 657.

The testimony in the case before me establishes that dropping the pan is the usual method of stopping the scrapers while operating in the quarry. In many situations it is the quickest and safest way to stop it. However, there are instances when dropping the pan is not safe or effective: when operating on pavement or on other hard surfaces, dropping the pan cannot be used; when the scraper engine fails while ascending a hill, dropping the pan will not stop the scraper going backwards downhill; in the case of buried rock or a limestone knoll, dropping the pan could injure the scraper operator.

The primary purposes of the pan or bowl on a scraper are, of course, to scrape, to strip, to load. Stopping the vehicle is not a primary function of the pan. Wheel or service brakes are intended to stop the vehicle; they are installed for that purpose.

I conclude that the term "brakes" in the standard involved here refers to the wheel or service brakes. They are required to be adequate, i.e., to be able to stop the equipment in a reasonable distance. The fact that there are other effective means of stopping the equipment does not satisfy the standard. Therefore I conclude that the violations charged in the citations involved here have been established.

PENALTY

DE NOVO

Under section 110(i) of the Act, the Commission has de novo authority to assess civil penalties for violations of the Act considering the six statutory criteria. Therefore the fact that the Secretary assessed penalties under the "special assessment" provisions of 30 C.F.R. Part 100 is irrelevant. Sellersburg Stone Co., 5 FMSHRC 287 (1983) aff'd, Sellersburg Stone Co. v. FMSHRC, 736 F2d. 1147 (7th Cir. 1984).

SIZE AND PRIOR HISTORY

Respondent is a large operator. Its history of previous violations is small, and penalties otherwise appropriate should not be increased because of its history.

GRAVITY

The scrapers are normally operated at no more than 12 to 15 miles per hour, and ordinarily at much less than that. I have found that they are normally stopped by dropping the pan. However, I further found that the service brakes may be required in some situations. The scrapers are extremely heavy and in the event they collided with a pedestrian or another piece of equipment could cause serious injury. I conclude that the violations were moderately serious.

NEGLIGENCE

Normal routine inspection and maintenance would have shown Respondent that the brakes were defective. It either knew or should have known that they were inadequate. In the case of scrapers 648 and 641 cited on February 25, 1987, Respondent had been put on notice by the citation issued February 3, 1987, on scraper 643 that the brakes should be inspected on its equipment. The violation charged in citation 2846910 was the result of Respondent's negligence; the violations charged in citation 2846916 and 2846917 were the result of gross negligence.

GOOD FAITH COMPLIANCE

Respondent did not abate the violation charged in citation 2846910 until a 104(b) order was issued three weeks later. It did not demonstrate good faith in attempting to achieve rapid compliance, and the penalty will be increased because of its failure. With respect to the violations charged in the other

citations (2846916 and 2846917), it did show good faith compliance.

PENALTY AMOUNTS

Considering the criteria in section 110(i) of the Act, I conclude that the appropriate penalties for the violations are:

Citation	Penalty
2846910	$ 800
2846916	600
2846917	600
	$2000

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Respondent pay the sum of $2000 within 30 days of the date of this decision for the violations found herein.

James A. Broderick
Administrative Law Judge

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